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In The

Supreme Court of the United States

October Term, 1994

DAVID C. OTIS, et al.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

DAN R. MENTER, et al.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

CLIFFORD H. GILDEA, et al.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI

HARRY W. ZANVILLE
ZANVILLE AND ZIMMERMANN
3116 Brockway Road
P.O. Box 426
Waterloo, IA 50704
(319) 232-1404
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

69 pp

QUESTIONS PRESENTED

1. Does the doctrine of field preemption, based on Federal Railroad Safety Act and related regulations, prevent the states from providing any statutory rights to railroad maintenance of way employees concerning substance abuse testing by employers, and, if so, are the Plaintiffs excluded from coverage?

2. Does the doctrine of negative preemption prevent the states from providing any statutory rights to railroad maintenance of way employees concerning substance abuse testing by employers where the Secretary of Transportation (1) excluded those employees from coverage, (2) did not promulgate regulations to implement the rehabilitation mandate of 45 U.S.C. 431(r)(3), and (3) did not take affirmative action to prohibit the states from exercising powers over this subject matter?

3. Is the opinion of the Federal Railway Administration that the Iowa Code § 730.5 is not preempted by federal law in this case entitled to great or even controlling deference in the determination of whether federal law mandates preemption?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Stanley W. Waldeier, Clifford H. Gildea, Ronald R. Scarberry, Dan R. Mentor, Harlan E. Smith, Earl E. Ewoldt, Thomas D. Cook, Robert W. Hallady, David C. Otis and the Brotherhood of Maintenance of Way Employes Chicago and North Western System Federation and the respondent Chicago and North Western Transportation Company.

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Petition For A Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Iowa Supreme Court entered in the above-entitled proceedings on April 20, 1994.

OPINIONS BELOW

The amended opinion of the Iowa Supreme Court is reported at 514 N.W.2d 90 and is reprinted in the appendix hereto, p. App. 11, *infra*.

The initial opinion of the Iowa Supreme Court and the decision of the Iowa District Court have not been reported. They are reprinted in the appendix hereto, p. App. 1 and p. App. 15, *infra*.

JURISDICTION

The Iowa Supreme Court, the highest court in the state of Iowa, entered a final judgment in this case on April 20, 1994. Amending an earlier decision filed on March 23, 1994, the Iowa Supreme Court affirmed on the alternate ground of federal field preemption summary judgment against Petitioners' claims.

The jurisdiction of this Court to review the judgment of the Iowa Supreme Court is invoked under 28 U.S.C. § 1257(a)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution states in Article VI, Clause 2:

> This Constitution and the Laws of the United States, which shall be made in Pursuance thereof . . . shall be the supreme law of the Land;

The Tenth Amendment to the United States Constitution states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Federal Railroad Safety Act, 45 U.S.C. § 421, provides:

> The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents. . . .

The Federal Railroad Safety Act, 45 U.S.C. § 431, provides:

> The Secretary of Transportation . . . shall prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . .

The Federal Railroad Safety Act, 45 U.S.C. § 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards related to railroad safety shall be nationally uniform to the

> extent practicable. A State may adopt or continue in force any law, rule, regulation, orders, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, orders, or standard covering the subject matter of such State requirement. . . .

Congressional Findings in the Omnibus Transportation Employee Testing Act of 1991, Sec. 2(7) of P.L. 102-143, 105 Stat. 952, amending the Federal Railroad Safety Act, state:

> Rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs, and should be made available to individuals.

Iowa Code § 730.5(3)(f) provides:

> An employer shall take no disciplinary action against an employee due to an employee's drug involvement the first time an employee's drug test indicates the presence of alcohol or a controlled substance if the employee undergoes a substance abuse evaluation, and if the employee successfully completes substance abuse treatment if treatment is recommended by the evaluation.

STATEMENT OF THE CASE

The Iowa Legislature passed Iowa Code § 730.5 in 1987 guaranteeing procedural and substantive rights for all employees related to employer mandated drug and alcohol testing. The statute embodies a careful compromise between the need for substance abuse testing and

the consequential effects to the employees, employers and the State of that testing.

The Respondent, Chicago and North Western Transportation Company ("CNW") complied with Iowa Code § 730.5 as well as a similar statute in Minnesota from July, 1987 until April, 1991. (App. 45).

However, after the CNW changed its policy of compliance in 1991, affected maintenance of way employees filed suits in the Iowa District Court to enforce their rights under Iowa Code § 730.5.

Three different fact patterns are consolidated in this case. Otis, Ewoldt, Cook and Halladay, were required by CNW to submit to drug testing upon their return from seasonal layoff. None of these employees tested positive for alcohol or drugs but all were delayed from returning to work and economically damaged because the testing was not conducted within the 30 day notice period required by Iowa law.

Mentor and Smith, failed chemical tests after an incident involving an entire track crew at work. Like Waldeier, Gildea and Scarberry who were not involved in an incident at work, they were first time violators, and were fired from their jobs without having been provided, *inter alia*, the pre-discharge rehabilitation opportunity required by Iowa law.

The parties submitted the case upon cross motions for summary judgment. The central issue argued by the parties was whether the Railway Labor Act ("RLA") preempts application of Iowa Code § 730.5 to railroad employees. Finding RLA preemption, the Iowa District

Court sustained CNW's motion for summary judgment and dismissed the employees cases. Timely notices of appeal were filed.

On February 15, 1994, after oral argument in these cases before the Iowa Supreme Court, the Federal Railway Administration ("FRA") published its Final Rules under Omnibus Transportation Employee Testing Act ("OTEA"). The FRA is the agency responsible for promulgation and implementation of rail safety regulations within the Department of Transportation. The employees requested a legal opinion from the FRA defining the preemptive effect, if any, of its regulations.

On March 23, 1994, the Iowa Supreme Court filed its ruling which disagreed with the RLA preemption analysis of the Iowa District Court but affirmed on the alternate ground(s) of negative field preemption.[1]

On March 31, 1994, the Chief Counsel of the FRA issued a legal opinion concluding that the Iowa statute is not preempted by federal drug and alcohol testing regulations.[2]

---

[1] The employees position that the Railway Labor Act does not preempt state statutes creating rights independent of collective bargaining agreements was vindicated by the Court's decision in *Norris v. Hawaiian Airlines, Inc.*, ___ U.S. ___ (1994).

[2] FRA's opinion is consistent with its prior drug and alcohol regulation excluding these employees from the definition of "covered employees". No statute and regulation mandates employer discharge or rehabilitation of those employees who violate the statute and Congress repeated its mandate for rehabilitation measures in the OTEA. 45 U.S.C. § 431(r)(1).

The employees timely requested a rehearing of the Iowa Supreme Court's decision. In its amended decision, the Iowa Supreme Court repeated its holding that the application of the Iowa statute to these railroad employees is barred by federal field preemption. It identified "a discernible federal policy, antedating the challenged drug testing, that empower testing of safety sensitive railway employees is not to be restricted by local law." App. 13. In particular, it found that the "Secretary's election not to restrict employer drug testing would frustrate the intent of Congress that the Secretary's decision is to be controlling." It disregarded the FRA opinion.

REASONS FOR GRANTING THE WRIT

1. The Iowa Supreme Court decision conflicts with this Court's precedents governing preemption of state statutes under the Supremacy Clause.

There is no basis for the findings of the Iowa Supreme Court that there is "a discernable federal policy, antedating the challenged drug testing, that empower testing of safety sensitive railway employees is not to be restricted by local law." App. 13. Its finding that the "Secretary's election not to restrict employer drug testing would frustrate the intent of Congress that the Secretary's decision is to be controlling" is as speculative as was its surmise that exclusion of maintenance of way workers from coverage under the FRSA and regulations was based on an implied decision that maintenance workers were more safety sensitive than any other railroad workers. App. 8. The Iowa Supreme Court simply failed to apply

any of the principles which the Court has repeatedly provided for appellate court guidance on preemption issues.

Despite the clarity of the imperative that federal statutes may supersede state's police powers only if it is the "clear and manifest purpose of Congress", *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S 707, 715 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and that preemption of laws within the traditional police powers of the state "should not be lightly inferred", *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987), the Iowa Supreme Court failed to analyze this matter according to the methodology established by the Court. *Norris v. Hawaiian Airlines, Inc.*, ___ U.S. ___ (1994). Absent unambiguous evidence, the Supremacy Clause may not be used to infer a scope of preemption beyond that which clearly is mandated by congress' language. *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. 2608, 2614 (1992); *Dept. of Revenue of Oregon v. ACF Industries, Inc.*, ___ U.S. ___, 114 S.Ct. 843, 850 (1994). The Iowa Supreme Court failed to understand that "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law", *Building & Trades Council v. Assoc. Builders*, 122 U.S. 565 (1993). The Iowa Supreme Court violated "[t]he teaching of this Court's decisions [which] enjoins seeking out conflicts between state and federal regulation where none clearly exists." *English v. General Electric Co.*, 496 U.S. 72 (1990).

The Iowa Supreme Court failed to understand that preemption analysis " . . . turns on the actual content of

respondent's policy and its real effect on federal rights" *Livadas v. Bradshaw*, ___ U.S. ___, 114 S.Ct. 2068, 2076 (1994). There is no conflict between either of these federal enactments and Iowa law. In reciting the federal concern for uniformity, the Iowa Supreme Court failed to acknowledge that the "requirement for uniformity is not absolute" and it is a "limitation [which] still leaves the States a wide scope." *American Dredging Co. v. Miller*, ___ U.S. ___, 114 S.Ct. 981, 987 (1994).

The Iowa Supreme Court flawed analysis caused it to contradict explicit federal statutory provisions and nullified matters that were presumably left subject to disposition provided by state law. *O'Melveny & Myers v. F.D.I.C.*, ___ U.S. ___, 114 S.Ct. 2048, 2054 (1994).

2. The Iowa Supreme Court decision conflicts with this Court's decision in *Cipollone* and other field preemption cases.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. 2608 (1992), the Court provided " . . . a welcome, definitive clarification" for the proper use of field preemption. *Toy Mfrs. of America, Inc. v. Blumenthal*, 806 F.Supp. 336, 342, fn. 5 (D. Con. 1992). In *Cipollone* the Court held that when Congress includes a preemption provision, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation. *Cipollone* at 112 S.Ct. 2618. "We resort to principles of implied preemption . . . only when Congress has been silent with respect to preemption." *Id.* at 112 S.Ct. 2625, 2633. The clarification was unanimous.

"Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted." *Id.* at 2618; *O'Hern v. Delta Airlines, Inc.*, 838 F.Supp. 1264, 1269 (N.D. Ill. 1993). "We do not, absent unambiguous evidence, infer a scope of preemption beyond that which clearly is mandated by Congress' language." *Cipollone* at 112 S.Ct. 2625-26. When construing the preemption clause Congress included in legislation, the courts must construe those provisions in light of the presumption against preemption of state police power regulations" so that the "presumption reinforces the appropriateness of a narrow reading . . . " *Id.* at 2618. Even where a preemption section is ambiguous, these rules of interpretation apply nonetheless and make it very unlikely that preemption will result. *Id.* at 2625-26. In the event of ambiguity, the test requires "any indulgence in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completing displacing the States." *Id.*

Because the FRSA has a specific preemption clause, field preemption analysis is inappropriate. 45 U.S.C. § 434 provides power to the States to continue in force law relating to railroad safety until the Secretary adopts a regulation covering the subject matter of state requirement. The FRA noted in its final publication of its regulations that: "Section 219.13, which states the preemptive effect of safety regulations issued under the FRSA (See 45 U.S.C. § 434), remains unchanged." 59 Fed. Reg. 7448, 7450 (2/15/94).

In *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991), the Supreme Court held that a grant of any power to the states in an area of federal regulation necessarily

renders field preemption inappropriate because this language would be surplusage if Congress had intended to occupy the entire field . . . .

Every court which has considered the language of 45 U.S.C. § 434 has held that the FRSA does not preempt the entire field of rail safety. *CSXT, Inc. v. Pitz*, 883 F.2d 468, 471 (6th Cir. 1989) (FRSA " . . . does not . . . purport to occupy the field of railroad regulation"); *Missouri Pac. R.R. v. Rd. Com'n of Texas*, 850 F.2d 264, 267 (5th Cir. 1988); *Union Pac. R. v. Pub. Util. Com'n of Oregon*, 723 F.Supp. 526, 529 (D. Or. 1989). Therefore, since the FRSA is narrowly construed and determines if preemption is required, resort to field preemption is erroneous. *CSX Transp., Inc. v. Easterwood*, 507 U.S. ___, 113 S.Ct. 1732 (1993).

3. The Iowa Supreme Court decision conflicts with this Court's precedents on the Doctrine of Negative Preemption.

When the Iowa Supreme Court based its decision on an election by the Secretary of Transportation not to restrict employer drug testing, it engaged in negative preemption analysis.

Negative preemption only is permissible where a conscious decision has been made not to allow any regulations. "The relevant inquiry . . . with respect to the State's power to impose a . . . rule is whether the Secretary has either promulgated his own . . . requirement . . . or has decided that no such requirement should be imposed at all." *Ray v. Atlantic Richfield Co.*, 435 U.S.

168, 172 (1978). "[T]here will be no preemptive effect given to a failure to regulate . . . unless either the federal regulator or the relevant statute has manifested a clear intent that [it] should remain entirely unregulated." *Toy Mfrs. supra* at 345.

Negative preemption does not occur merely because Congress creates a regulatory field or because a federal regulator did not regulate. Preemption based on unexercised authority is clearly erroneous. "It may be that rules will be forthcoming that will preempt the State's . . . rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause." *Ray, supra* at 172. The absence of regulation suggests intent not to preempt. *LaMontagne v. E.I. Du Pont de Nemours and Co.*, 834 F.Supp. 576, 586 (D. Conn. 1993); *Toy Mfrs., supra.* This is because "[m]ere silence . . . cannot suffice to establish a clear and manifest purpose to preempt local authority." *Mortier,* 111 S.Ct. at 2483.

CNW cannot point a single statement to that effect in FRSA, regulations or rule-making proceedings. *See: Arkansas Elec. Coop v. Arkansas Pub. Serv. Com'n,* 461 U.S. 375 (1983); *Interstate Towing Ass'n, Inc. v. Cincinnati,* 6 F.3d 1154, 1159-61 (6th Cir. 1993); *Murphy v. Dept. of Nat. Resources,* 837 F.Supp. 1217, 1222 (S.D. Fla. 1993). *Compare: Norfolk & Western Ry. v. Pub. Utilities Com'n,* 926 F.2d 567 (6th Cir. 1991).

Furthermore, after *Cipollone* the use of negative inferences is confined to inferences against preemption.

Not only does the FRA deny existence of such preemption, there is nothing in the record or anywhere else

to support such a conclusion. The use of negative preemption in this case is contrary to the requirements of *Ray*.

4. The Iowa Supreme Court decision conflicts with this Court's decisions requiring deference to agency interpretation of both statutes and regulations.

On March 31, 1994, the FRA, through its Chief Counsel, S. Mark Lindsey, issued a legal opinion explicitly stating FRA regulations do *not* preempt or conflict with the Iowa Code § 730.5. App. 42. It states, *inter alia:*

> "FRA's alcohol and drug testing regulations (49 C.F.R. Part Part 219) do not conflict with the [Iowa] Code as it applies to MOW workers."; "MOW workers are not subject to FRA's alcohol and drug regulations"; "Certainly, FRA's reference to MOW employees in Part 209 was not intended to affect alcohol and drug testing under railroad rules or state law"; "In sum, FRA does not regulate the alcohol and drug testing of MOW workers. Accordingly, because alcohol and drug testing of such workers is not within the subject matter of Part 219 I do not see how FRA has preempted any state requirements pertinent to testing of any MOW workers."

The Iowa Supreme Court considered the FRA opinion but concluded that it "appeared to speak only to state regulations requiring drug testing of employees and not to state regulation prohibiting such testing." App. 13-14. However, the FRA expressly reviewed the Iowa statute and fully answered the question concerning preemptive effect. The

Iowa Supreme Court simply disregarded the agency opinion and ineffectively attempted to distinguish it.

By disregarding the FRA legal opinion, the Iowa Supreme Court also disregarded the precedents of this case requiring deference to administrative agencies opinions. The FRA letter is a vital aid in the search for Congressional intent.

Judicial deference to reasonable agency interpretations of statutes that the agency administers is a dominant, well-settled principal of federal law. *Pauley v. Beth Energy Mines, Inc.*, 501 U.S. 680 (1991); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), *Chevron, U.S.A. Inc. v. Natural Resources Defense*, 467 U.S. 837, 843 (1984). Such deference is given if the statute is silent or ambiguous with respect to the specific issue as long as the agency's answer is based on a permissible construction of the statute, in light of the structure and language of the statute as a whole. *Chevron, U.S.A., supra* at 843; *Sullivan v. Everhart*, 494 U.S. 83, 88 (1990). If the text of the statute is subject to differing interpretations, the court can reject the agency's interpretation only if it is unreasonable. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, ___ U.S. ___, 112 S.Ct. 1394, 1401, 118 (1992); *Emerson v. Steffen*, 959 F.2d 119, 121 (8th Cir. 1992).

Where a court reviews an agency's interpretation of its own regulations, however, an even higher degree of deference is owed. *Creighton Omaha Regional Health Care Corp. v. Sullivan*, 950 F.2d 563, 565 (8th Cir. 1991). Such deference is particularly warranted in cases where the interpretation is based upon agency expertise in a complex area, *Aluminum Co. of Am. v. Central Lincoln People's Util. Dist.*, 467 U.S. 380 (1984); and where the agency has

rulemaking authority, *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978). *See: Murphy v. Dept. of Natural Resources*, 837 F.Supp. 1217, 1224; *LaFarge Corp. v. Campbell*, 813 F.Supp. 501, 512 (W.D. Texas 1993).

In addition, the FRA opinion expressly addressed the application of the statute to the proposed issue and is entitled to great deference on that ground alone. *Investment Co. Inst. v. Camp*, 401 U.S. 617, 627-28 (1971).

5. The Iowa Supreme Court decision conflicts with explicit statutory authority.

Congress stated in its Findings that "rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs, and should be made available to individuals, as appropriate." OTEA, Sec. 2(7) of P.L. 102-143, 105 Stat. 952, 953. These Findings are significant evidence of Congressional intent. State law requiring rehabilitation as a precondition to employer testing (as distinguished from testing for federal disqualification) is not inconsistent with federal law.

Since the FRA issued an opinion stating that it has not preempted Iowa law and that the Iowa statute does not frustrate federal policy, the predicate of the Court's decision is clearly erroneous.

In its decision the Court found that the Iowa statute encroached on federal *authority* (not its exercise) under 45 U.S.C. § 431. Phrased in purely speculative terms, the Court never found any **actual** conflict between Iowa Code § 730.5 and federal law. The section the Court believed to be preemptive misapprehended the fact that

45 U.S.C. § 431 is not the FRSA preemption clause. *Compare,* 45 U.S.C. § 434.

The FRA regulations themselves permit the state of Iowa to enforce Chapter 730.5. 45 U.S.C. § 434 specifically provides that a state may adopt and continue to enforce any law relating to railroad safety until the Secretary of Transportation adopts a regulation "covering" the subject matter of the state requirement. *See also,* 49 C.F.R. Ch. II, Subpart A, Sec. 219.13. Compare, OTEA. The term "covering" has special meaning under federal law. Unlike "relating to" which confers broad preemptive effect, "covering" is a more restrictive term which indicates that preemption will occur only if the federal regulations substantially subsume the subject matter of the relevant state law. *CSX Transportation, supra; Morales v. Trans World Airlines, Inc.,* ___ U.S. ___, ___, 112 S.Ct. 2031, 2036 (1992). None of the appellants are "covered" in any way by FRA regulations relating to rehabilitation.

The FRA regulations cited by the CNW do not preempt the Act in these cases. Menter and Smith were discharged in June, 1989, prior to the effective date of the FRA regulations cited by the CNW. Similarly, these FRA regulations have no impact on the claim of the furlough employees. Nothing in the FRA regulations addresses such employees who have not yet returned to work, who have not been involved in an accident and who have not given rise to probable cause testing. Furthermore, the subject matter of the Act is not the same subject matter as covered by the FRA regulations and, therefore, the state of Iowa has the power under 45 U.S.C. § 434 to continue

in effect the protections granted to return from furlough employees.

The rights of Waldeier, Gildea and Scarberry under the Act are unaffected by the FRA regulations. The FRA regulations only address the circumstances in which employees may be taken out of service in federal, not railroad company, purposes. The FRA regulations do not compel any result (either discharge or rehabilitation) as a result of the drug or alcohol infraction, although they do encourage the railroad company to rehabilitate such employees. Iowa's statute which mandates rehabilitation under most circumstances is unaffected by the FRA regulations and, under 45 U.S.C. § 434, is still a valid minimum substantive working condition statute designed to protect not just the workers but the public interest of the state of Iowa.

CONCLUSION

The entire basis of the Court's decision is contrary to Congressional intent and is contrary to this Court's precedents governing the proper federal preemption methodology. The employees request that the decision of the Iowa Supreme Court be reversed and remanded for further proceedings.

Respectfully submitted,

HARRY W. ZANVILLE
ZANVILLE AND ZIMMERMAN
3116 Brockway Road
P.O. Box 426
Waterloo, IA 50704
(319) 232-1404

IN THE SUPREME COURT OF IOWA

No. 1/92-2079

(Filed March 23, 1994)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES CHICAGO AND NORTH WESTERN SYSTEM FEDERATION, DAVID C. OTIS, EARL E. EWOLDT, THOMAS D. COOK, and ROBERT W. HALLADY,

Appellants,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

DAN R. MENTER and HARLAN E. SMITH,

Appellants,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

STANLEY W. WOLDEIER, CLIFFORD H. GILDEA, RONALD R. SCARBERRY, and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES CHICAGO AND NORTH WESTERN SYSTEM FEDERATION,

Appellants,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey, Judge.

Railway employers and railway employees' union appeal from dismissal on federal law preemption grounds of their action to enjoin employee drug testing policies of carrier. **AFFIRMED.**

Harry W. Zanville of Zanville and Zimmermann, Waterloo, for appellants.

Bruce E. Johnson of Gamble & Davis, P.C. Des Moines, for appellee.

Considered by McGiverin, C.J., and Harris, Carter, Snell, and Andreasen, JJ.

CARTER, J.

Railway employees and railway employees' union appeal from the dismissal, on federal law preemption grounds, of their efforts to enjoin implementation of their employer's drug testing policies. We affirm the judgment of the district court, albeit for somewhat different reasons than that court advanced.

All of the individual plaintiffs are employees of defendant, Chicago and North Western Transportation Company (CNW), and members of plaintiff Brotherhood of Maintenance of Way Employees Chicago and North Western System Federation (BMWE). Plaintiffs allege that they are entitled to protections contained in Iowa Code section 730.5 (1991) regarding the drug testing of employees or applicants for employment. They argue that they have been illegally required to submit to drug testing under policies of CNW that are prohibited by section

730.5. They assert that, as a result, they either face disciplinary procedures or have been otherwise damaged in their employment.

Plaintiffs Waldeier, Gildea, and Scarberry were tested and subsequently discharged from employment due to have tested positive for the presence of alcohol. They were all first-time substance abuse violators and were not given an alternative test opportunity.

Plaintiffs Smith and Menter were chemically tested in Nebraska after an incident that took place five miles west of the Iowa-Nebraska border. Both were first-time violators, and both were discharged after test results were determined to be positive for the presence of prohibited substances.

Plaintiffs Otis, Ewoldt, Cook, and Hallady were required to pass a medical examination prior to being returned to service from furlough status. Each was required to submit to a year-end drug screening as part of the examination. None of these plaintiffs tested positive for drugs or alcohol. They claim they were economically damaged due to the delay in returning to work as a result of the amount of time required to do the drug and alcohol screening.

CNW has had rules in place, in one form or another, regarding drug and alcohol testing since at least 1910. These rules were originally identified as Rule H, and are now known as Rule G. Rule G has been continually amended and modified through the years. On March 17, 1987, CNW adopted its alcohol and drug use policy (ADU), which described the methods that CNW would

use to enforce its rules and policies regarding prohibited alcohol and drug use.

In 1991, the three groups of plaintiffs separately filed the claims involved on this appeal. After answers were filed by CNW and limited discovery was conducted, the cases were consolidated and submitted for decision to the district court upon cross-motions for summary judgment. The defendant carrier's motion was based on preemption grounds. The district court granted the motion, concluding that it lacked subject matter jurisdiction because the employee's claims are inextricably linked with an area of compulsory arbitration under the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151-188 (R.L.A.). The district court did not rule on an alternative theory of preemption contained in CNW's motion for summary judgment, *i.e.*, that federal drug testing regulations, issued pursuant to authority granted the Secretary of Transportation by 45 U.S.C. § 431, preempt the application of state law limitations on employer drug testing.

The appellant-employees urge that the district court's theory of preemption based on the R.L.A. is fatally flawed. Most specifically, they urge that the present dispute fails to meet an essential requirement for R.L.A. preemption laid down in *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) (*Conrail*). In *Conrail*, a railway employees' labor union challenged the carrier's right to uniformly impose urinalysis drug screening on employees in periodic and return-from-leave physical examinations. The parties agreed that this was a labor dispute subject to the R.L.A. but disagreed as to whether

it was a "minor dispute," calling for compulsory arbitration, or a "major dispute," calling for a lengthy bargaining and mediation process. In stating the requirements for a dispute subject to the compulsory arbitration standards of the R.L.A., the Court declared:

> [T]he line drawn . . . looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute may be conclusively resolved by interpreting the existing agreement.

Id. at 305, 109 S. Ct. at 2482, 105 L. Ed. 2d at 263. The *Conrail* Court concluded that the drug testing dispute in that case was a minor dispute subject to compulsory arbitration under the R.L.A. No claim had been presented in that case, however, involving legal rights, whose source was outside of a collective bargaining agreement. The only issue presented had been whether the existing collective bargaining agreement did or did not authorize the carrier's drug testing policy.

Appellants urge that their challenge to the carrier's right to take the disputed action is based exclusively on a state statute that operates independently of and without regard to any existing collective bargaining agreement. For this reason, they claim that the issue of whether the carrier's action was unlawful may not be conclusively resolved by interpretation of he existing collective bargaining agreement. This agreement finds considerable support in *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), *cert. denied*, ___ U.S. ___ (1993). In *Davies*, a United States Court of Appeals, in applying *Conrail*,

held that it precluded an R.L.A. forum-preemption defense to a retaliatory-discharge claim based on Oklahoma law. The basis for this ruling was the court's conclusion that the state law claim existed outside of the collective bargaining agreement and could be decided without interpreting that agreement. Obviously, the situation in *Davies* bears a substantial similarity to the present dispute on the question of R.L.A. preemption of state law claims.

The district court accurately stated the *Conrail* test in its ruling, but then, without explanation, broadened that test so as to require compulsory R.L.A. arbitration wherever the circumstances surrounding the claim are inextricably intertwined with subject matter dealt with in a collective bargaining agreement. CNW urges that this broad test is correct and seeks to support it by the decisions of lower federal courts antedating *Conrail*. We have considerable difficulty in accepting this broader standard because to do so would ignore the clear meaning of the language employed by the Supreme Court in its most recent consideration of this issue.

We do not find it necessary to hold directly on the validity of the district court's R.L.A. preemption theory in order to decide this appeal. We ordinarily will affirm a district court ruling in which any proper basis appears for doing so, even though our reason is not the one upon which the district court based its holding. *Citizens First Nat'l Bank v. Hoyt*, 297 N.W.2d 329, 332 (Iowa 1980); *General Motors Acceptance Corp. v. Keil*, 176 N.W.2d 837, 841-42 (Iowa 1970); *Schnabel v. Vaughn*, 258 Iowa 839, 845, 140 N.W.2d 168, 172 (1966).

We have previously stated the alternative preemption argument contained in CNW's motion for summary judgment. Unlike its contention for preemption under the R.L.A., which is a forum-preemption theory, the alternative argument is one of "field preemption," which addresses whether Congress has explicitly or implicitly (by pervasive and comprehensive regulation) precluded states from regulating a particular area of conduct. *See Davies,* 971 F.2d at 465.

CNW's alternative theory in its motion for summary judgment was that federal regulations issued by the Secretary of Transportation, pursuant to the authority of federal statute (45 U.S.C. § 431), preempt the field of employee drug testing by rail carrier employers. Appellants urge that they are maintenance of way employees, who are not subject to the federal drug testing requirements that exempt federally regulated employers from section 730.5(2). This federal law preemption issue must be distinguished from the issue of statutory interpretation involving the language in section 730.5(2). The legislature in excepting certain categories of federally regulated employees from the provisions of the statute could limit that exception as it chose. Its decision in that regard is of slight consequence in determining whether the federal regulatory scheme for employee drug testing in the railroad industry, as authorized by Congress, was intended to occupy the field of regulation in that particular area.

Federal preemption is a doctrine that is shaped by federal law. Explicit preemption occurs if Congress expressly indicates that it intends to preempt state law. *Morales v. Trans World Airlines, Inc.,* 504 U.S. ___, ___, 112

S. Ct. 2031, 2036, 119 L. Ed. 2d 157, 167 (1992). Preemption may also be implied if it can be determined that Congress intended to occupy the entire field to the exclusion of the states. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 105 S. Ct. 1904, 1910, 85 L. Ed. 2d 206, 213-14 (1985). Implicit preemption is most likely found to exist in situations in which state law would conflict with or frustrate Congressional policy. *CSX Transp., Inc. v. Easterwood*, 507 U.S. ___, ___, 113 S. Ct. 1732, 1737, 123 L. Ed. 2d 387, 396 (1993).

Appellants urge the Congress, in exempting maintenance of way employees from the Hours of Service Act, 45 U.S.C. §§ 61*b*-64*b*, in effect elected to exempt those employees from the federal drug testing regulations applicable to other railway workers. That argument is premised on the fact that, at the time of the chemical testing procedures that are challenged in these consolidated actions, the Secretary's regulations on employee drug testing only extended to railway workers subject to the Hours of Service Act. That group of employees constituted about seventy-five percent of railway workers.

Maintenance of way employees occupy positions designated as safety-sensitive by the Secretary of Transportation. That circumstance suggests that the purpose of the Secretary of Transportation's decision not to include maintenance of way employees among those subject to federal drug testing regulations applicable to seventy-five percent of federal railway employees was to allow the employers of these safety-sensitive employees to impose more stringent drug testing requirements than were allowed for other types of employees. The Secretary appears to have had the authority to impose drug testing

requirements on maintenance of way employees similar to those imposed by appellants' employer at the time the challenged testing by CNW took place. The Secretary's authority extended to "necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." 45 U.S.C. § 431(a);[1] *see Railway Labor Executives Ass'n v. Skinner*, 934 F.2d 1096, 1097-98 (9th Cir. 1991). A 1991 amendment to 45 U.S.C. § 431, adding present § 45 U.S.C. § 431(r), made the Secretary's authority in this area even more explicit.

The fact that the federal policy was less explicit prior to the latter amendment does not, in our view, indicate that there was not an established federal policy on regulation of employee drug testing governing maintenance of way employees. Federal policy may be shaped by either regulation or nonregulation of employer action. Either way the Secretary's election is under Congressional authority. Allowing the several states of the union to apply local law that is inconsistent with the Secretary's election not to restrict employer drug testing would frustrate the intent of Congress that the Secretary's decision is to be controlling. Consequently, we agree with the district court's decision to dismiss appellants' claims.

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[1] Section 431(a) also provides that

> nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act, including agreements relating to qualification of employees, which are not inconsistent with rules, regulations, orders or standards prescribed by the Secretary.

We conclude that decisions imposing a bar by virtue of "field preemption," as distinguished from "forum preemption," are on the merits rather than involving lack of jurisdiction. The district court did have jurisdiction to consider CNW's defenses to appellants' claims and could properly dismiss those claims on the basis that the substantive laws on which the claims were based are not available to appellants.

Other than finding that the dismissal is technically on the merits rather than jurisdictional, we affirm the judgment of the district court.

AFFIRMED.

IN THE SUPREME COURT OF IOWA

NO. 92-2079

ORDER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES CHICAGO AND NORTH WESTERN SYSTEM FEDERATION, DAVID C. OTIS, EARL E. EWOLDT, THOMAS D. COOK, and ROBERT W. HALLADY,

Appellants,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

DAN R. MENTER and HARLAN E. SMITH,

Appellants,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

STANLEY W. WOLDEIER, CLIFFORD H. GILDEA, RONALD R. SCARBERRY, and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES CHICAGO AND NORTH WESTERN SYSTEM FEDERATION,

Appellants,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

(Filed Apr. 20, 1994)

Appellants have filed a petition for rehearing. With the approval of the entire court, the author of the opinion has amended the opinion filed March 23, 1994, by striking original page 11 and substituting it with new pages 11 and 12, which are attached to this order. With this amendment considered, the petition for rehearing is denied.

Dated this 20th day of April, 1994.

SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin
Arthur A. McGiverin,
Chief Justice

Copies to:

Harry W. Zanville
Zanville & Zimmermann
3116 Brockway Road
P.O. Box 426
Waterloo, IA 50704

Bruce E. Johnson
Gamble & Davis, P.C.
Suite 2600
666 Grand Avenue
Des Moines, IA 50309-2577

Iowa State Bar Association
521 E. Locust Street
Des Moines, Iowa 50309

Mead Data Central
P.O. Box 8809
Dayton, Ohio 45401

West Publishing Company
EDITORIAL DEPARTMENT D3
610 Opperman Drive
P.O. Box 64526
St. Paul, Minnesota 55164-0526

The fact that the federal policy was less explicit prior to the latter amendment does not, in our view, indicate that there was not an established federal policy on regulation of employee drug testing governing maintenance of way employees. Federal policy may be shaped by either regulation or nonregulation of employer action. Either way the Secretary's election is under Congressional authority.

The foregoing conclusions are not, as appellants suggest, based on a retroactive application of either (a) the enlarged authority granted to the Secretary, or (b) the Secretary's subsequently enacted regulations. Rather, they are based on discernible federal policy, antedating the challenged drug testing, that employer testing of safety-sensitive railway employees is not to be restricted by local law. There is not, as appellants suggest, a Congressional grant of power to the states in the area in dispute that negates preemption under the doctrines established in *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), or *Wisconsin Public Intervenor v. Mortier*, 501 U.S. ___, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991). Appellants' suggestion that the contrary is true is based on language in 45 U.S.C. § 434, which provides that a state may adopt or continue in force any "standard relating to railroad safety" until such time as the secretary has adopted a rule covering the same subject matter.

The state legislation at issue here is not railroad safety regulation. It is general employee rights legislation in conflict with federal employee drug testing policy. The tendered letter from the Secretary's head counsel, indicating that federal regulations were not intended to affect

alcohol and drug testing under state law, appears to speak only to state regulation requiring drug testing of employees and not to state regulation prohibiting such testing. Allowing the several states of the union to apply local law that is inconsistent with the Secretary's election not to restrict employer drug testing would frustrate the intent of Congress that the Secretary's decision is to be controlling. Consequently, we agree with the district court's decision to dismiss appellants' claims.

We conclude that decisions imposing a bar by virtue of "field preemption," as distinguished from "forum preemption," are on the merits rather than involving lack of jurisdiction. The district court did have jurisdiction to consider CNW's defenses to appellants' claims and could properly dismiss those claims on the basis that the substantive laws on which the claims were based are not available to appellants.

Other than finding that the dismissal is technically on the merits rather than jurisdictional, we affirm the judgment of the district court.

AFFIRMED.

IN THE IOWA DISTRICT COURT FOR
CERRO GORDO COUNTY

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES CHICAGO AND NORTH WESTERN SYSTEM FEDERATION, DAVID C. OTIS, EARL E. EWOLDT, THOMAS D. COOK and ROBERT W. HALLADY, Plaintiffs, v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, Defendant.	)	Cause No. 52606-0491 RULING
DAN R. MENTER and HARLAN E. SMITH, Plaintiffs, v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, Defendant.	)	Cause No. 52635-0491 RULING

STANLEY W. WALDEIER, CLIFFORD H. GILDEA, RONALD R. SCARBERRY and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES CHICAGO AND NORTH WESTERN SYSTEM FEDERATION, Plaintiffs, v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, ID #36-272-5945, Defendant.	)	Cause No. 53023-1291 RULING (Filed Dec. 4, 1992)

* * *

BE IT REMEMBERED that on the 24th day of August, 1992, the above-entitled matters came on for hearing upon the parties' respective motions for summary judgment and for partial summary judgment. Plaintiffs appeared by their attorney of record, Mr. Harry W. Zanville or Waterloo, Iowa, and defendant appeared by its attorney of record, Mr. Bruce E. Johnson of Des Moines, Iowa. Evidence having been submitted, the entire file and record having been reviewed and the court being duly advised in the premises now enters the following ruling.

FINDINGS OF FACT

For purposes of resolving the issues presented to the court under the parties' motions for summary judgment,

the court finds the undisputed relevant material facts as follows:

1. The individual plaintiffs herein are employees of defendant railroad and members of plaintiff, Brotherhood of Maintenance of Way Employees Chicago and North Western Systems Federation, ("BMWE"). BMWE is a railway labor organization which is a "representative" of "employees" within the meaning of the Railway Labor Act, 45 U.S.C. Section 151. Its members are employed in the track, bridge and building, water supply, construction, fuel departments, and shops on the defendant's railroad system. The BMWE acts on its own behalf and on behalf of the employees of defendant whom they represent.

2. Defendant, Chicago and North Western Transportation Company ("CNW"), is a corporation engaged in the business of owning, maintaining and operating a line and system of railroad which extend in part through Mason City, Cerro Gordo County, Iowa.

3. The Hours of Service Act, 45 U.S.C. Section 61 et seq. as implemented by 49 C.F.R. 209, 213-29, and 231-236, does not apply to plaintiffs because they are Maintenance of Way Employees. Maintenance of Way Employees occupy safety sensitive positions as designated by the Federal Railway Administration.

4. Plaintiffs Otis, Ewoldt, Cook and Hallady are employed seasonally by defendant and maintain their employment status as furloughed employees until they are summoned back to work as active employees by defendant.

5. Plaintiffs Otis, Ewoldt, Cook and Hallady were required to pass a medical department examination prior to being returned to service from furlough status. They were not disciplined for rule violations. These employees were furloughed and submitted applications for positions bulletined on March 5, 1991, to be effective April 1, 1991. Each was required to take a urine drug screen in connection with the medical department policy's on return to service physical examinations. Following the medical department's receipt of the drug screen results, plaintiffs were returned to service as follows: Cook on April 8, 1991; Ewoldt on April 9, 1991; Otis, April 15, 1991; and Hallady, April 8, 1991. Each of these plaintiffs are claiming damages for the time lost between April 1, 1991, and the date returned to service.

6. On June 2, 1989, plaintiffs Menter and Smith, Maintenance of Way Employees, were dismissed from their jobs by defendant on the basis that the plaintiffs required drug test results were positive for the presence of prohibited substances which defendant claims violated Rule G.

7. Plaintiffs Waldeier, Gildea and Scarberry, Maintenance of Way Employees, face disciplinary procedures to be conducted by defendant pertaining to defendant's requirement that said employees submit to a breathalyzer test for alcohol.

8. Plaintiffs have all submitted grievances pursuant to the Federal Railway Labor Act and are either appealing the decisions of the Special Board of Adjustment or are accorded avenues of appeal under that administrative process.

9. The defendant's rules governing drug and/or alcohol tests have been unilaterally issued and implemented on the CNW and its predecessor companies since at least as early as 1910. General Rule H, effective September 1, 1910, appended as Exhibit 1 to the affidavit of Paul Lundberg, Vice-President of Labor Relations of the CNW, was placed in effect unilaterally by the railroad and prohibited the use of intoxicants while on duty and frequenting of places where they were sold. When the rule was re-issued on December 1, 1929, as Rule 8, it was amended to also prohibit the use of narcotics while on duty or frequenting places where they are sold as shown by Exhibit 2 attached to Lundberg affidavit. The rule was again unilaterally amended on January 1, 1953, and was now identified as Rule G and prohibited the use of intoxicants or narcotics while subject to duty, that is, prior to reporting to work, and further prohibited possession even if not being used while on duty as shown by Exhibit 3 attached to Lundberg affidavit. On June 1, 1967, Rule G was unilaterally modified to prohibit employees from being under the influence of alcoholic beverages or narcotics while on duty or on company property and prohibited use or possession of alcoholic beverages or narcotics while on company property even though off-duty, such as at a lodging facility, as shown by Exhibit 4 to Lundberg affidavit. Rule G was again unilaterally amended in 1975 by expanding the group of drugs covered by the rule and setting forth the conditions under which certain prescription drugs may be used by employees as shown by Exhibit 5 to Lundberg affidavit. The 1975 addition to Rule G was again unilaterally modified on October 1, 1980, by

including a prohibition against liquids containing alcohol as shown by Exhibit 6 to Lundberg affidavit.

10. On March 17, 1987, CNW promulgated its alcohol and drug use policy ("ADU") which described the methods that CNW would use to enforce its rules and policies regarding prohibited alcohol and drug use. These methods included: (1) a codification of the enforcement of the provisions of Rule G and the medical examination and employee assistance referral programs that were of long-standing practice and already in effect; (2) refine the methods of enforcing Rule G by providing for breath and urine tests for alcohol and drugs in reasonable cause and reasonable suspicion situations where CNW had a basis for believing a violation of Rule G may be present; and (3) provided for incorporating a drug screen into the routine medical examination to determine an employee's fitness for service. Exhibit 7 attached to Lundberg affidavit is a copy of ADU policy issued on March 17, 1986.

On August 15, 1990, the CNW modified its Rule G to also prohibit the presence of alcoholic beverages and drugs in the body fluids of employees on duty or on company property as shown by Exhibit 8 to Lundberg affidavit. That rule now reads as follows:

> "The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Presence of any alcohol, intoxicants, narcotics, marijuana or other controlled substances in the body fluids of employees while on duty or on company property is considered possession and is prohibited.

> Employees must not report for duty with the presence in their body fluids of any medication, including those prescribed by a doctor, that may in any way adversely affect the safe performance of their duties. Employees who are prescribed any drug or medication by a licensed physician (1) the possession of which is prohibited by law; (2) which belongs to the generic categories of narcotics, depressants, stimulants, tranquilizers, hallucinogens or antidepressants; (3) which is assigned a registration number by the U.S. Food and Drug Administration not included in (2); or (4) any liquid containing alcohol, must obtain from the treating physician a written statement (which upon request, will be submitted by the employee to his supervisor) certifying that in the physician's opinion the drug or medication prescribed at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties."

11. On August 15, 1990, CNW modified its ADU policy to provide an opportunity for employees who have been dismissed for Rule G for the first time and who have been diagnosed as drug abusers to be reinstated upon petition. It also provided for the employee assistance director to issue instructions to employes regarding the conditions that must be met in order to be qualified for service and to monitor that compliance in accordance with those instructions as shown in Exhibit 9 attached to Lundberg affidavit. On April 27, 1986, CNW unilaterally amended its Rule G to include a provision prohibiting off-duty drug use by its employees. That provision provided as follows:

"Employees subject to call for duty, reporting for duty, on duty or on company property are prohibited from using or being under the influence of alcoholic beverages or intoxicants. Possession of alcoholic beverages or intoxicants is prohibited while on duty or on company property.

Employees shall not report for duty, be on company property or be on duty under the influence of, or use while on duty or on company property any drug or other substance that may in any way adversely affect their alertness, coordination reaction, response or safety. This prohibition includes prescription medications.

The illegal use, illegal possession or illegal sale of any drug by employees while on or off-duty is prohibited."

12. Following substantial litigation, the matter was settled with CNW reinstating its Rule G that existed prior to April 27, 1986, as shown by the settlement and stipulation of voluntary dismissal filed in the United States District Court for the District of Minnesota in Case No. 4-86-575 attached as Exhibit 10 to Lundberg affidavit.

13. Upon issuance of the ADU policy on March 17, 1987, plaintiff BMWE as well as the Railway Labor Executives Association and 15 other CNW unions representing CNW employees filed an action in the United States District Court for the Eastern District of Michigan, Southern Division, seeking to declare and enjoin CNW's ADU policy as a violation of the mandatory bargaining provisions (major dispute provisions) of the Railway Labor Act. This litigation was transferred to the United States

District Court for the District of Minnesota, Third Division. Following a series of court decisions, including the Supreme Court decision in *Consolidated Rail Corporation v. RLEA*, 109 S.Ct. 2477 (1989), which held, among other things, that issues of drug and alcohol policies and testing were minor disputes under the Railway Labor Act, the BMWE for and on behalf of its members, including all plaintiffs in these cases, entered into a stipulation to dismiss and settlement agreement in that case which provided among other things that BMWE's remedies (including its members) regarding actions taken under or changes to the ADU and Rule G policies were governed exclusively by the provisions of Railway Labor Act grievance procedures, 45 U.S.C. Section 153, as required by the collective bargaining agreements and the Railway Labor Act. The stipulation for dismissal with prejudice and settlement agreement are set forth as Exhibit 12 to Lundberg affidavit. In the settlement agreement it is recited that:

> "2. CNW recognizes the right of the plaintiffs pursuant to Section 153 of the RLA, subject to the assertion by CNW of any defenses it may have, including but not limited to time limits and statute of limitations defenses, to submit and/or progress claims and grievances as to whether CNW is prohibited by its collective bargaining agreements, express or implied, from taking actions in regard to CNW employees under the ADU policy or CNW's Rule G (including but not limited to return to service drug/alcohol screening, disciplinary action or medical disqualifications) or from making changes to the ADU policy or Rule G.

"3. Plaintiffs recognize that the remedies under RLA Section 153 referred to in paragraph 2 of this agreement are exclusive, except that this settlement agreement shall not waive any rights any of the parties may have under the RLA to seek judicial enforcement of an arbitration award, should the party prevail in an arbitration permitted under this settlement agreement, nor shall this agreement operate as a bar to either party seeking to have any subsequent arbitration award set aside for any reasons set forth in 45 U.S.C. Section 153, first and second."

14. Plaintiff BMWE did not waive any state law rights, did not intend to waive any state law rights, and as a matter of law, were incapable of waiving any state law rights by reason of the settlement agreements and disposition of the federal cases in Minnesota (See Mann affidavit).

CONCLUSIONS OF LAW

The individual plaintiffs and BMWE allege that they are entitled to protection of Iowa Code Section 730.5 notwithstanding the statute's recognition of the preemptive effect of federal statutes and regulations. The individual plaintiffs claim that they have been illegally required to submit to drug testing under policies created by CNW and have either faced disciplinary procedures or have been damaged in their employment by policies effectuated by CNW in violation of Iowa Code Section 730.5. Plaintiffs ground jurisdiction upon Iowa Code Section 602.6101 and Article 5, Section 1 of the 1857 Constitution of Iowa, and upon Iowa Code Section 730.5(9)(b).

Plaintiffs request that the court issue a temporary and permanent injunction against defendant prohibiting drug testing except as specified in Section 730.5 and further barring any disciplinary action by reason of the drug tests or refusal of plaintiffs to submit thereto. Plaintiffs further ask for damages relative to their individual circumstances and for court costs and attorney's fees. Plaintiffs also seek a declaratory judgment adjudicating CNW to be in violation of Section 730.5. These cases were consolidated by agreement of the parties at the hearing upon their respective motions for summary judgment based upon the identical nature of the legal issues presented herein.

Defendant claims that plaintiffs' cause of action is preempted by the Railway Labor Act, 45 U.S.C. Section 153, and that defendant's policies concerning drug screening would be subjects of "minor disputes" under the implied provisions of the parties' collective bargaining agreement. Defendant claims this court lacks subject matter jurisdiction to hear and decide plaintiffs' claims and that the National Railroad Adjustment Board exercises exclusive jurisdiction over these types of cases.

Defendant further asserts plaintiffs' claims are barred by the doctrine of res judicata by reason of the settlement agreements between defendant and plaintiffs' union in the cases finalized in the United States District Court for the District of Minnesota, Third and Fourth Divisions, in which the parties agreed that the Railway Labor Act provides for the exclusive remedies for disputes arising out of defendant's drug screening procedures. Defendant further claims that plaintiffs, as members of the union,

are bound to follow the grievance procedures set forth under the Railway Labor Act.

Because this court determines that it lacks subject matter jurisdiction to hear and decide plaintiffs' claims in the first instance, it neither addresses nor resolves the various other arguments and issues presented by the parties.

Iowa Code Section 730.5 provides as follows:

"1. As used in this section, 'drug test' means any blood, urine, saliva, chemical, or skin tissue test conducted for the purpose of detecting the presence of a chemical substance in an individual.

2. Except as provided in subsection 7, an employer shall not require or request employees or applicants for employment to submit to a drug test as a condition of employment, preemployment, promotion, or change in status of employment. An employer shall not request, require, or conduct random or blanket drug testing of employees. However, this section does not apply to preemployment drug tests authorized for peace officers or correctional officers of the state, or to drug tests required under federal statutes or under federal regulations adopted as of July 1, 1990, or to drug tests conducted pursuant to a nuclear regulatory commission policy statement, or to drug tests conducted to determine if an employee is ineligible to receiver workers' compensation under section 85.16, subsection 2.

The exemption granted by this subsection relating to drug testing pursuant to federal regulations adopted as of July 1, 1990, is of no effect, as it applies to a particular regulation, upon a finding by a court of competent jurisdiction, including any appeal of such

finding, that the particular regulation is unconstitutional or otherwise invalid. The decision of a court invalidating any regulation exempted by this section shall not be stayed pending appeal.

3. This section does not prohibit an employer from requiring a specific employee to submit to a drug test if all of the following conditions are met:

a. The employer has probable cause to believe that an employee's faculties are impaired on the job.

b. The employee is in a position where such impairment presents a danger to the safety of the employee, another employee, a member of the public, or the property of the employer, or when impairment due to the effects of a controlled substance is a violation of a known rule of the employer.

c. The test sample withdrawn from the employee is analyzed by a laboratory or testing facility that has been approved under rules adopted by the department of public health.

d. If a test is conducted and the results indicate that the employee is under the influence of alcohol or a controlled substance or indicate the presence of alcohol or a controlled substance, a second test using an alternative method of analysis shall be conducted. When possible and practical, the second test shall use a portion of the same test sample withdrawn from the employee for use in the first test.

e. An employee shall be accorded a reasonable opportunity to rebut or explain the results of a drug test.

f. The employer shall provide substance abuse evaluation, and treatment if recommended by the evaluation, with costs apportioned as provided under the employee benefit plan or at employer expense, if there is no employee benefit plan, the first time an employee's drug test indicates the presence of alcohol or a controlled substance. *An employer shall take no disciplinary action against an employee due to the employee's drug involvement the first time the employee's drug test indicates the presence of alcohol or a controlled substance if the employee undergoes a substance abuse evaluation, and if the employee successfully completes substance abuse treatment if treatment is recommended by the evaluation.* However, if an employee fails to undergo substance abuse evaluation when required under the results of a drug test, or fails to successfully complete substance abuse treatment when recommended by an evaluation, the employee may be disciplined up to and including discharge. The substance abuse evaluation and treatment provided by the employer shall take place under a program approved by the department of public health or accredited by the joint commission on accreditation of hospitals.

4. In conducting those tests designed to identify the presence of chemical substances in the body, the employer shall ensure to the extent feasible that the tests only measure and that the records of the tests only show or make use of information regarding chemical substances in the body which are likely to affect the ability of the employee to perform safely the employee's duties while on the job.

5. This section does not restrict an employer's ability to prohibit the use of alcohol or controlled substances during work hours or to discipline employees for being under the influence of alcohol or controlled substances during work hours.

6. This section does not prevent an employer from conducting medical screening in order to monitor exposure to toxic or other unhealthy substances encountered in the workplace or in the performance of their job responsibilities. Any such screening must be limited to the specific substances required to be monitored.

7. A drug test conducted as a part of a physical examination performed as a part of a preemployment physical or as a part of a regularly scheduled physical is only permissible under the following circumstances:

a. For a preemployment physical, the employer shall include notice that a drug test will be part of a preemployment physical in any notice of advertisement soliciting applicants for employment or in the application for employment, and an applicant for employment shall be personally informed of the requirement for a drug test at the first interview.

b. For a regularly scheduled physical, the employer shall give notice that a drug test will be part of the physical at least thirty days prior to the date the physical is scheduled.

Drug testing conducted under this subsection shall conform to the requirements of subsection 3, paragraphs 'c', 'd', 'e', and 'f'; however, paragraph 'f' shall not apply to drug tests conducted as a party of a preemployment physical.

8. An employer shall protect the confidentiality of the results of any drug test conducted on an employee. The results of the test may be recorded in the employee's personnel records; however, if an employee whose test indicated the employee was under the influence of alcohol or a controlled substance has undergone substance abuse evaluation and, when treatment is indicated under the substance abuse evaluation, successfully completed treatment for substance abuse, the employee's personnel records shall be expunged of any reference to the test or its results when the employee leaves employment.

9. This section may be enforced through a civil action.

a. A person who violates this section or who aids in the violation of this section is liable to an aggrieved employee or applicant for employment for affirmative relief including reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate including attorney fees and court costs.

b. When a person commits, is committing, or proposes to commit, an act in violation of this section, an injunction may be granted through an action in district court to prohibit the person from continuing such acts. The action for injunctive relief may be brought by an aggrieved employee or applicant for employment, the county attorney, or the attorney general.

In an action brought under this subsection alleging that an employer has required or requested a drug test in violation of this section, the employer has the burden of proving that the requirements of this section were met.

10. An employee shall not be discharged, disciplined, or discriminated against in any manner for filing a complaint or testifying in any proceeding or action involving violations of this section. An employee discharged, disciplined, or otherwise discriminated against in violation of this section shall be compensated by the employer in the amount of any loss of wages and benefits arising out of the discrimination and shall be restored to the employee's previous position of employment.

11. A person who violates this section is, upon conviction, guilty of a simple misdemeanor." (Emphasis added)

A review of the legislative action giving rise to the statute and its amendments, as well as the relevant case law construing and interpreting the statute, is necessary to determine the state interest in regulating drug testing procedures. The court must view that interest and further determine whether it creates "the potential for interference with the federal regulatory scheme." *Farmers v. Brotherhood of Carpenters, Local 25,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). If the claims raised by plaintiffs are identical to grievances allowed to be filed administratively, then the potential for interference with the regulatory scheme is too great in order to allow for an exception to the preemption doctrine. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978).

Iowa Code Section 730.5 was amended in 1990 to insert the language "or under federal regulations adopted as of July 1, 1990," pertaining to the preemptive provisions contained under subsection (2). 1990 Acts, Chapter 1188, Section 1. The code editor's note indicates that

"although 1990 Acts, Chapter 1188, Section 1, and 1990 Acts, Chapter 1233, Section 42, technically conflict in their references to federal statutes, 1990 Acts, Chapter 1188, Section 2, provides that Section 1 of that chapter takes precedence, so it was codified." 1990 Acts, Chapter 1233, Section 42, would have inserted the language "or as required under Section 391, subpart (h) of the Federal Motor Carrier Safety Regulations adopted by the United States Department of Transportation" in lieu of the enacted amendment. Other than that nebulous legislative activity, there is nothing by way of legislative history to indicate to this court the extent to which the Iowa legislature intended Section 730.5 should be preempted by federal statutes or regulations. The court is, therefore, required to interpret the statute as written and amended.

It is clear that the Iowa law grants aggrieved employees several remedies, including the opportunity to bring a civil action against their employer for reinstatement, back pay, attorney's fees and court costs as well as applying for injunctive relief prohibiting the employer from conducting illegal drug testing. Iowa Code Section 730.5(9)(a)(b); *Waechter v. Aluminum Company of America,* 454 N.W. 2d 565, 567 (Iowa 1990).

According to the Iowa Supreme Court, the Iowa legislature enacted Iowa Code Section 730.5 "in response to a widespread belief that employers have the right to expect a drug-free workplace and should be able to require employees to take steps to ensure it." *Anderson v. Warren Distribution Company,* 469 N.W.2d 687, 689 (Iowa 1991); *Breithaupt v. Employment Appeal Board,* 453 N.W.2d 532, 535 (Iowa App. 1990). In *Waechter v. Aluminum Company of America,* 454 N.W.2d 565 (Iowa 1990), the Iowa

Supreme Court affirmed the trial court's dismissal of an employee's suit filed under Section 730.5, concluding that the employee and employer (ALCOA) had intended to settle her claim against ALCOA when she agreed to accept terms of compromise offered by ALCOA in settlement of her grievance filed under the union's collective bargaining agreement. In that case, the union was not a party to the settlement agreement because "they feared such action could be interpreted as a concession by the union that ALCOA's drug testing procedure was legal." 454 N.W.2d at page 567.

Plaintiffs are not specifically covered by the Hours in Service Act which would normally regulate drug screening for railroad employees. However, by reason of the history of drug screening rules and the commonly accepted applicability of Rule G, drug screening procedures are viewed as implied terms of the parties' collective bargaining agreement. *Railway Labor Executives v. Norfolk and Western Ry,* 833 F.2d 700, 705-707 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co.,* 802 F.2d 1016, 1022 (8th Cir. 1986).

The United States Supreme Court has held that disputes pertaining to the addition of a drug testing component to routine physical examinations are minor disputes under the Railway Labor Act, 45 U.S.C. Section 151 et seq. *Consolidated Rail Corporation v. Railway Labor Executives' Association, et al.,* 491 U.S. 299, 105 L.Ed.2d 250, 109 S.Ct. 2477 (1989). In that case, the parties had agreed that Con Rail's inclusion of drug testing in all physical examinations created a labor dispute governed by the Railway Labor Act. The issue decided in *Con Rail* was whether

such labor dispute was a "minor" dispute or "major" dispute under the RLA. As the court stated:

> "A minor dispute in the railroad industry is subject to compulsory and binding arbitration before the National Railroad Adjustment Board, Section 3, or before an adjustment board established by the employer and the unions representing the employees. Section 3, second. The board (as we shall refer to any adjustment board under the RLA) has exclusive jurisdiction over minor disputes. Judicial review of the arbitral decision is limited."

105 L.Ed.2d at 262.

As stated by the United States Supreme Court in *Slocum v. Delaware Lackawanna and Western Railroad Company,* 339 U.S. 239, 94 L.Ed. 795 (1950):

> "In 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a national adjustment board composed of representatives of railroads and unions. 48 Stat. 1189-1193, Chapter 691. The act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad employee disputes growing out of the interpretation of existing agreements. The adjustment board is well-equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway

> systems. . . . A common law or statutory action for wrongful discharge differs from any remedy which the board has power to provide and does not involve questions of future relations between the railroad and its other employees."

94 L.Ed. at 800.

Plaintiffs argue by analogy from recent federal cases that the Railway Labor Act does not preempt all state law claims for wrongful discharge which are deemed independent of the parties' collective bargaining agreement. *Sabich v. National Railroad Passenger Corporation,* 763 F.Supp. 989 (N.D. Illinois 1991); *Santoni Roig v. Iberia Lineas Aereas De Espana,* 688 F.Supp. 810 (Dist. Puerto Rico 1988). In *Santoni,* the court stated:

> "In applying the preemption analysis in the labor field, great deference is given to state legislation exercising concerns for the general health and welfare of its residents."

688 F.Supp. at 816.

In *Sabich v. National Railroad Passenger Corp.,* the federal district court determined that resolution of the issues necessary to determine Sabich's retaliatory discharge claim did not require the court to interpret any term of the collective bargaining agreement and concluded that the issue at hand presented a "purely factual inquiry" without the need to resort to any provision of the collective bargaining agreement. Reasoning that since Sabich's retaliatory discharge claim was independent of such agreement, the court concluded that it was not preempted by the RLA and the exclusive jurisdiction of the arbitration process.

The United States Supreme Court has further held that employees' statutory rights under federal legislation are not foreclosed or barred by reason of an employee's submission of grievances to arbitration based upon identical underlying facts. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 67 L.Ed.2d 641, 101 S.Ct. 1437 (1981); *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1973).

In an interesting case, the U.S. Court of Appeals for the 7th Circuit has concluded that although the RLA does not preempt the substantive right of employees under a state statute pertaining to furloughs as the result of the repeal of full crew laws, the *remedy* was held to be governed by federal law. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. Barfknecht*, 852 F.2d 960, 964 (7th Cir. 1988).

As recognized in *Sabich*, "the Supreme Court has yet to address the RLA preemption with respect to state law tort claims." 763 F.Supp. at 991.

Certain common threads of analyses appear throughout the cases. First and foremost, the courts consider whether or not the state created claim, be it common law tort or statutory, requires interpretation of the parties' collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 1882, 100 L.Ed.2d 410 (1988). Additionally, the courts have looked at whether the employee's action is based upon a "matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and the RLA." *Magnuson v. Burlington Northern Inc.*, 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930, 99

S.Ct. 318, 58 L.Ed.2d 323 (1979); *Majors v. U.S. Air, Inc.*, 525 F.Supp. 853, 856 (D. Maryland 1981). Also, the courts have focused upon whether the statutory claim was identical to a grievance submitted by the employee which posed the possibility of interference with federal regulatory interests so as to prevent applicability of an exception to the preemption doctrine. *Jackson v. Consolidated Rail Corporation*, 717 F.2d 1045, 1054 (7th Cir. 1983). The 7th Circuit Court of Appeals stated in *Jackson*, supra:

> "In contrast, the RLA has made *any* grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies contained in that act, 45 U.S.C. Section 153 first subparagraph (i). It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA."

Id. at 1052.

Based upon the principles set forth in the cases cited above, the seminal issue becomes whether Iowa Code Section 730.5 creates an independent claim which does not require resort to the parties' collective bargaining agreement.

Applying these principles to the case at hand, one can hardly conceive of circumstances which would be more "inextricably intertwined with the grievance machinery of the collective bargaining agreement and the RLA" than drug screening of railroad union employees. Historically, drug screening has been a disputed arena between railroad companies and their respective labor

unions for years, and in this case since 1910, over seventy-two years ago. Certainly, application and enforcement of defendant's drug testing procedures necessarily arise from the day-to-day working conditions and operation of the railroad and the purpose for such procedures is to insure the safety of the employees as well as the public during the operation of the railroad.

The parties have agreed in the settlement agreements in the Minnesota district court that plaintiffs recognize that the remedies under RLA Section 153 are exclusive based upon the United States Supreme Court's recent holding in the *Consolidated Rail* case.

As stated in *Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (Dist. Maryland 1981):

> " . . . The doctrine of preemption is concerned with the subordination of state law to federal law. While it is true that some courts have held that claims brought under subsequently enacted federal laws are not barred by the mandatory arbitration provisions of the Railway Labor Act, it does not, therefore, follow that state remedies also survive."

Id. at 855.

"A plaintiff may not avoid the mandatory arbitration process by asserting a state cause of action. Artful pleading cannot disguise what is truly a minor dispute under the RLA." *Santonti Roig*, supra, at 813. See also *Miller v. Norfolk and Western Railway Company*, 834 F.2d 556, 562. Although Iowa Code Section 730.5 does provide employees substantive rights with respect to drug screening procedures performed during the course of their

employment subsection 2 thereof recognizes the distinct possibility and probability that federal statutes and regulations would prevent application of the state statute. The clear import of the exemption language contained within Iowa Code Section 730.5 is that federal law should not be infringed upon if it governs the relationship between the employer and employee. "Minor disputes," such as those asserted by plaintiffs, were intended to be regulated administratively by the RLA as set forth in *Con Rail*, supra. Based upon the statutory language, it does not appear that Iowa Code Section 730.5 was meant to invade the province of arbitrators under the Railway Labor Act.

In order to determine whether or not relief could be granted to an aggrieved railroad employee under Section 730.5, a court would have no choice but to refer to the implied terms of the collective bargaining agreement pertaining to the procedures of drug screening already in place and accepted as part and parcel of the working conditions. Multitudinous issues involving the efficacy of the parties' collective bargaining agreement in light of application of state law would emerge. The settled procedure of the collective bargaining system and resolution of grievances thereunder pertaining to drug screening would be rendered meaningless in a practical sense if the courts of this state undertook the resolution of such disputes.

Plaintiffs have filed identical grievances with the adjustment board pertaining to the identical disputes raised in this case. The subject of these disputes has a "not obviously insubstantial relationship to the parties' collective bargaining agreement." *Magnuson v. Burlington*

Northern, Inc., 576 F.2d 1367, 1369-1370 (9th Cir. 1978); *Farmer*, supra, at 1369-1370.

In short, the drug screening "vine" cultivated by the parties has been growing around the "trunk and limbs" of the collective bargaining "tree" for so long that any state court "pruning job" would substantially interfere with the federal regulatory "gardeners."

Accordingly, the court concludes that it lacks subject matter jurisdiction to entertain plaintiffs' claims for all of the above and foregoing reasons and that, therefore, plaintiffs' claims should be dismissed at plaintiffs' costs. By so concluding, this court merely determines that it does not have the power to decide or consider plaintiffs' claims; the court specifically does not address nor consider the merits but rather determines that the adjustment board should resolve the disputes between the parties.

RULING

IT IS THEREFORE ORDERED that defendant's motions for summary judgment filed in the above-entitled matters be and the same are hereby granted. IT IS FURTHER ORDERED that plaintiffs' motions for summary judgment are hereby denied.

IT IS FURTHER ORDERED that plaintiffs' claims are hereby dismissed and court costs as taxed by the Clerk of Court in the total sum of $85.00 in #52606, 85.00 in 52635, 90.00 in 53023 are hereby assessed against plaintiffs and accordingly judgment is entered therefor.

Dated this 4th day of December, 1992.

/s/ John S. Mackey
Judge of the Second Judicial
District of Iowa

Clerk shall furnish copies to:

Harry W. Zanville
Bruce E. Johnson

[logo]
U.S. Department
of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

**Federal Railroad
Administration**

MAR 31 1994

Harry W. Zanville, Esq.
Zanville and Zimmerman
3116 Brockway Road
P.O. Box 426
Waterloo, IA 50704-0426

Re: Iowa Code

Dear Mr. Zanville:

Than you for your March 7 letter asking whether the Federal Railroad Administration's (FRA) regulations preempt § 730.5 of the Iowa Code (Code), as applied to maintenance of way (MOW) workers.

In this section of the Code, Iowa regulates employee and applicant drug testing. FRA has regulated railroad alcohol and drug testing since 1986. Nevertheless, FRA's alcohol and drug testing regulations (49 CFR Part 219) do not conflict with the Code as it applies to MOW workers, since Part 219 does not apply to MOW workers or other non-hours of service employees.

Under Part 219, a covered employee is one "who has been assigned to perform service subject to the Hours of Service Act (45 U.S.C. 61-64b) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service." 49 CFR § 219.5. Consequently, Part 219 coverage is determined by the Hours of Service Act (49 CFR Part

228), which covers employees who are engaged in or connected with train movements, transmit or receive orders involving train movements, or install and maintain signal systems. MOW workers install, maintain, or repair track or related structures. Since this service is not subject to the Hours of Service Act, MOW workers are not subject to FRA's alcohol and drug regulations.

I must also emphasize that a safety-sensitive employee is not necessarily a covered employee for Part 219 purposes, as an examination of FRA's enforcement procedures (49 CFR Part 209) makes clear. Although section 209.303 lists MOW workers as one of the categories of employees that perform safety-sensitive functions, hours of service (and by extension, Part 219) employees are listed in paragraph (a), while MOW workers are listed separately in paragraph (b). Thus, the two categories of employees are distinguished on the face of the rule and Part 209 has no bearing on the issue of Part 219 coverage. Certainly, FRA's reference to MOW employees in Part 209 was not intended to affect alcohol and drug testing of such employees under railroad rules or state law.

In a December 15, 1992, notice [57 FR 59588], FRA proposed expanding Part 219 coverage to include first line supervisors in random alcohol and drug testing programs. The proposed redefinition did not include MOW workers. In its final rule [59 FR 7448] implementing alcohol testing in response to the Omnibus Transportation Employee Testing Act of 1991, FRA did not adopt this proposal and the definition of covered employee in Part 219 was not changed.

In sum, FRA does not regulate the alcohol and drug testing of MOW workers. Accordingly, because alcohol and drug testing of such workers is not within the subject matter of Part 219, I do not see how FRA has preempted any state requirements pertinent to such testing of MOW workers. I hope that this information is helpful.

Sincerely,

/s/ S. Mark Lindsey
S. Mark Lindsey
Chief Counsel

November 2, 1989

CDRT. # P 127 021 321
Mr. E. D. Ewoldt
1024 N. Quint St.
Carroll, IA 51401

You will arrange to appear for a hearing as indicated below:

PLACE: Roadmaster's Office, 500 W. 5th St., Carroll, IA

DATE: Friday, November 10, 1989

TIME: 10:00 A.M.

CHARGE: Your violation of Rule G while on duty on company property at West pass near Dennison, IA on October 25, 1989.

You may be accompanied by one or more persons of your choosing subject to applicable rules of the BMWE Schedule, and you may, if you so desire, produce witnesses in your own behalf without expense to the Transportation Company.

This will also serve as notice that you are held out of service pending investigation.

This investigation is, in whole or in part, the result of a drug test indicating the presence of a controlled substance. For employees not subject to the Hours of Service Law, under Iowa law, the Transportation Company may not take disciplinary action against an employee due to the employee's drug involvement the first time the employee's drug test indicates the presence of alcohol or a controlled substance if the employee undergoes a substance abuse evaluation, and if the employee successfully completes substance abuse treatment if treatment is recommended by the evaluation. If you elect to exercise this

right, this investigation will be postponed until it is determined that you have failed to undergo substance abuse evaluation or have failed to successfully complete substance abuse treatment when recommended by an evaluation. You must also sign below and return to the address below prior to the scheduled starting time of the investigation as noted above.

I elect to exercise the right as provided in the above paragraph.

SIGNED:___ DATE:___

/s/ D.L. Boger
D. L. Boger
Asst. Vice Pres. – Track

cc: L. R. Fenhaus
P. J. Greco
J. E. Biggerstaff
T.L. Gaskill
J.C. Domski

RECEIPT

Mr. D. L. Boger
Asst. V.P.-Track
C&NWT Co.
165 N. Canal St.-6 No.
Chicago, IL 60606

Receipt is hereby acknowledged for notice of hearing to be held in the Roadmaster's Office, 500 W. 5th St., Carroll, IA on Friday, Nov. 10, 1989, at 10:00 AM.

Signed___ Date___

You will arrange to appear for hearing as indicated below:

Place: Engineering Office St Paul, MN
275 East 4th St., St Paul, MN 55101

DATE: Thursday, July 28, 1988

TIME: 10:30 AM

CHARGE: Your violation of Rule G when you had illegal drugs in your system while on duty on July 14, 1988

You maybe accompanied by one or more persons of your own choosing subject to applicable rules of the BMWE Schedule, and you may, if you so desire, produce witnesses in your own behalf without expense to the Transportation Company.

This investigation is, in whole or in part, the result of a drug test indicating the presence of a controlled substance. For employees not subject to the Hours of Service Law, under Minnesota law, the Transportation Company may not take disciplinary action against an emplyee [sic] following the employee's first positive drug test unless the employee has been given an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the Transportation Company after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency; and the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from

the program before its completion or by a positive test result on a confirmatory test after completion of the program. If you elect to exercise your rights under this law, this investigation will be postponed until it is determined that you have either refused to participate in the counseling or rehabilitation program or have FAILED TO SUCCESSFULLY COMPLETE THE PROGRAM. You must also sign below and return to the address below prior to the scheduled starting time of the investigation as noted below.

I elect to exercise the right provided in the above paragraph.

SIGNED___ DATE___

CC:

J. C. Domski
Assistant Division Manager
Engineering

Receipt is hereby acknowledged for notice of hearing to be held at the Engineering Office, St Paul, Mn Thursday, July 28, 1988 at 10:30AM

SIGNED___ DATE___

No. 94-152

FILED
AUG 31 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

DAVID C. OTIS, et al.,

v. *Petitioners,*

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

DAN R. MENTOR, et al.,

v. *Petitioners,*

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

CLIFFORD H. GILDEA, et al.,

v. *Petitioners,*

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Iowa Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE E. JOHNSON
LEWIS, WEBSTER, JOHNSON, VAN WINKLE & DEVOLDER
620 Liberty Building
418 Sixth Avenue
Des Moines, IA 50309
Telephone: (515) 243-1000

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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51 pp

QUESTION PRESENTED

DO THE RAILWAY LABOR ACT, 45 U.S.C. § 151, ET SEQ., AND THE FEDERAL RAIL SAFETY ACT OF 1970, 45 U.S.C. § 421, ET SEQ., INDIVIDUALLY OR WHEN READ TOGETHER, PREEMPT ENFORCEMENT AGAINST RESPONDENT OF IOWA CODE § 730.5, WHICH MANDATES LESS STRINGENT DRUG TESTING FOR EMPLOYEES THAN DO THE RESPONDENT RAILROAD'S WORK RULES?

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED BUT NOT SET OUT FULLY IN THE PETITION

The United States Constitution, Article I, Section 8:

> The Congress shall have the power . . . to regulate commerce with foreign nations; among the several States, and with the Indian Tribes . . .

45 U.S.C. § 431(a):

> Sec. 431. Promulgation of rules, regulations, orders, and standards.
>
> (A) Authority of Secretary; collective bargaining agreements under Railway Labor Act as consistent with rules, etc.
>
> The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provision of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety. However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act [45 U.S.C.A. Sec. 151, *et seq.*], including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be construed to give the Secretary authority to issue rules, regulations, orders, and standards relating to qualifications or employees, except such qualifications as are specifically related to safety.

45 U.S.C. § 434:

> Section 434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation.
>
> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent

practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 153(i):

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 153(q):

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment board. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it

may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

Iowa Code § 730.5:

2. Except as provided in subsection 7, an employer shall not require or request employees of applicants for employment to submit to a drug test as a condition of employment, preemployment, promotion, or change in status of employment. An employment shall not request, require, or conduct random or blanket drug testing of employees . . .

3. This section does not prohibit an employer from requiring a specific employee to submit to a drug test if all of the following conditions are met:

a. The employer has probable cause to believe that an employee's faculties are impaired on the job.

b. The employee is in a position where, such impairment presents a danger to the safety of the employee, another employee, a member of the public, or the property of the employer, or when impairment due to the effects of a controlled substance is a violation of a known rule of the employer.

c. The test sample withdrawn from the employee is analyzed by a laboratory or testing facility that has been approved under rules adopted by the department of public health.

d. If a test is conducted and the results indicate that the employee is under the influence of alcohol or a controlled substance or indicate the presence of alcohol or a controlled substance, a second test using an alternative method of analysis shall be conducted. When possible and practical, the second test shall use a portion of the

same test sample withdrawn from the employee for use in the first test.

e. An employee shall be accorded a reasonable opportunity to rebut or explain the results of a drug test.

f. The employer shall provide substance abuse evaluation, and treatment if recommended by the evaluation, with costs apportioned as provided under the employee benefit plan or at employer expense, if there is no employee benefit plan, the first time an employee's drug test indicates the presence of alcohol or a controlled substance. An employer shall take no disciplinary action against an employee due to the employee's drug involvement the first time the employee's drug test indicates the presence of alcohol or a controlled substance if the employee undergoes a substance abuse evaluation, and if the employee successfully completes substance abuse treatment if treatment is recommended by the evaluation. However, if an employee fails to undergo substance abuse evaluation when required under the results of a drug test, or fails to successfully complete substance abuse evaluation when required under the results of a drug test, or fails to successfully complete substance abuse treatment when recommended by an evaluation, the employee may be disciplined up to and including discharge. The substance abuse evaluation and treatment provided by the employer shall take place under a program approved by the department of public health or accredited by the joint commission on accreditation of hospitals . . .

* * *

7. A drug test conducted as a part of a physical examination performed as a part of a preemployment physical or as a part of a regularly scheduled physical is only permissible under the following circumstances:

a. For a preemployment physical, the employer shall include notice that a drug test will be part of a preemployment physical in any notice or advertisement soliciting applicants for employment or in the application for employment, and an applicant for employment shall be personally informed of the requirement for a drug test at the first interview.

b. For a regularly scheduled physical, the employer shall give notice that a drug test will be part of the physical at least thirty days prior to the date the physical is scheduled.

Drug testing conducted under this subsection shall conform to the requirements of subsection 3, paragraphs "c", "d", "e", and "f"; however, paragraph "f" shall not apply to drug tests conducted as a part of a preemployment physical . . .

* * *

9. This section may be enforced through a civil action.

a. A person who violates this section or who aids in the violation of this section is liable to an aggrieved employee or applicant for employment for affirmative relief including reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate including attorney fees and court costs.

b. When a person commits, is committing, or proposes to commit, an act in violation of this section, an injunction may be granted through an action in district court to prohibit the person from continuing such acts. The action for injunctive relief may be brought by an aggrieved employee or applicant for employment, the county attorney, or the attorney general.

In an action brought under this subsection alleging that an employer has required or requested a drug test in violation of this section, the employer has the burden of proving that the requirements of this section were met . . .

* * *

11. A person who violates this section is, upon conviction, guilty of a simple misdemeanor.

59 CFR Ch. II, Subpart D, 209.301 and 209.303:

209.301

(a) This subpart prescribes the rules of practice for administrative proceedings relating to the determination of an individual's fitness for performing safety-sensitive functions under 209(f) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 438(f)).

(b) The purpose of this subpart is to prevent accidents and casualties in railroad operations that result from the presence in the work force of railroad employees, including managers and supervisors, and agents of railroads who have demonstrated their unfitness to perform the safety-sensitive functions described in 209.303 by violating any rule, regulation, order or standard prescribed by FRA. Employees and agents who evidence such unfitness may be disqualified, under specified terms and conditions, temporarily or permanently, from performing such safety-sensitive functions.

(c) This subpart does not preempt a railroad from initiating disciplinary proceedings and imposing disciplinary sanctions against its employees, including managers and supervisors, under its collective bargaining agreements or in the normal and customary manner. Disqualification determinations made under the subpart shall have no effect on prior or subsequent disciplinary actions taken against such employees by railroads.

209.303 coverage.

(a) Railroad employees who are assigned to perform service subject to the Hours of Service Act (45 U.S.C. 61-64b) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service.

(b) Railroad employees or agents who:

(1) Inspect, install, repair or maintain track and roadbed;

(2) Inspect, repair or maintain locomotives, passenger cars, and freight cars;

(3) Conduct training and testing of employees when the training or testing is required by the FRA's safety regulations; or

(c) Railroad managers, supervisors or agents when they:

(1) Perform the safety-sensitive functions listed in paragraphs (a) and (b) of this section;

(2) Supervise and otherwise direct the performances of the safety-sensitive functions listed in paragraphs (a) and (b) of this section; or

(3) Are in a position to direct the commission of violations of any of the requirements of parts 213 through 236 of this title.

STATEMENT OF THE CONSOLIDATED CASES

These three consolidated civil actions arose when Appellee Chicago and North Western Transportation Company ("CNW") conducted drug screening in accordance with its work and safety rules, and Appellants Brotherhood of Maintenance of Way Employees ("BMWE") and employees Otis, Ewoldt, Cook, Halladay, Menter, Smith, Waldeier, Gildea and Scarberry filed actions in the Iowa District Court for Cerro Gordo County alleging the CNW violated § 730.5, Code of Iowa.

After Answers were filed by CNW and limited discovery was conducted, the cases were consolidated and submitted for decision to the Iowa District Court upon cross motions for summary judgment. The Iowa District Court ruled on December 4, 1992 that it lacked subject matter jurisdiction over these cases because the Railway Labor Act ("RLA"), 45 U.S.C. 151, et seq., preempts § 730.5, Code of Iowa.

Set out below are ¶¶ 1-13 of the Iowa District Court's "undisputed relevant material facts (District Court Ruling pp. 2-8, Petitioner's App. 17-24):

> 1. The individual plaintiffs herein are employees of defendant railroad and members of plaintiff, Brotherhood of Maintenance of Way Employees Chicago and North Western Systems Federation ("BMWE"). BMWE is a railway labor organization which is a 'representative' of 'employees' within the meaning of the Railway Labor Act, 45 U.S.C. Section 151. Its members are employed in the track, bridge and building, water supply, construction, fuel departments, and shops on the defendant's railroad system. The BMWE acts on its own behalf and on behalf of the employees of defendant whom they represent.
>
> 2. Defendant, Chicago and North Western Transportation Company ("CNW"), is a corporation engaged in the business of owning, maintaining and operating a line and system or railroad which extend in part through Mason City, Cerro Gordo County, Iowa.

3. The Hours of Service Act, 45 U.S.C. Section 61 et seq. as implemented by 49 C.F.R. 209, 213-29, and 231-36, does not apply to plaintiffs because they are Maintenance of Way Employees. Maintenance of Way Employees occupy safety sensitive positions as designated by the Federal Railway Administration.

4. Plaintiffs Otis, Ewoldt, Cook and Hallady are employed seasonally by defendant and maintain their employment status as furloughed employees until they are summoned back to work as active employees by defendant.

5. Plaintiffs Otis, Ewoldt, Cook and Hallady were required to pass a medical department examination prior to being returned to service from furlough status. They were not disciplined for rule violations. These employees were furloughed and submitted applications for positions bulletined on March 5, 1991, to be effective April 1, 1991. Each was required to take a urine drug screen in connection with the medical department's policy on return to service physical examinations. Following the medical department's receipt of the drug screen results, plaintiffs were returned to service as follows: Cook on April 8, 1991; Ewoldt on April 9, 1991; Otis, April 15, 1991; and Hallady, April 8, 1991. Each of these plaintiffs are claiming damages for the time lost between April 1, 1991, and the date returned to service.

6. On June 2, 1989, plaintiffs Menter and Smith, Maintenance of Way Employees, were dismissed from their jobs by defendant on the basis that the plaintiffs' required drug test results were positive for the presence of prohibited substances which defendant claims violated Rule G.

7. Plaintiffs Waldeier, Gildea and Scarberry Maintenance of Way Employees, face disciplinary procedures to be conducted by defendant pertaining to defendant's requirement that said employees submit to a breathalyzer test for alcohol.

8. Plaintiffs have all submitted grievances pursuant to the Federal Railway Labor Act and are

either appealing the decisions of the Special Board of Adjustment or are accorded avenues of appeal under that administrative process.

9. The defendant's rules governing drug and/or alcohol tests have been unilaterally issued and implemented on the CNW and its predecessor companies since at least as early as 1910. General Rule H, effective September 1, 1910, appended as Exhibit 1 to the affidavit of Paul Lundberg, Vice-President of Labor Relations of the CNW [App. 281], was placed in effect unilaterally by the railroad and prohibited the use of intoxicants while on duty and frequenting of places where they were sold. When the rule was re-issued on December 1, 1929, as Rule 8, it was amended to also prohibit the use of narcotics while on duty or frequenting places where they are sold as shown by Exhibit 2 attached to Lundberg affidavit [App. 283]. The rule was again unilaterally amended on January 1, 1953, and was now identified as Rule G and prohibited the use of intoxicants or narcotics while subject to duty, that is, prior to reporting to work, and further prohibited possession even if not being used while on duty as shown by Exhibit 3 attached to Lundberg affidavit [App. 285]. On June 1, 1967, Rule G was unilaterally modified to prohibit employees from being under the influence of alcoholic beverages or narcotics while on duty or on company property and prohibited use or possession of alcoholic beverages or narcotics while on company property even though off-duty, such as at a lodging facility, as shown by Exhibit 4 to Lundberg affidavit [App. 287]. Rule G was again unilaterally amended in 1975 by expanding the group of drugs covered by the rule and setting forth the conditions under which certain prescription drugs may be used by employees as shown by Exhibit 5 to Lundberg affidavit [App. 289]. The 1975 addition to Rule G was again unilaterally modified on October 1, 1980, by including a prohibition against liquids containing alcohol as shown by Exhibit 6 to Lundberg affidavit [App. 291].

10. On March 17, 1987, CNW promulgated its alcohol and drug use policy ("ADU") which described the methods that CNW would use to enforce its rules and policies regarding prohibited alcohol and drug use. These methods included: (1) a codification of the enforcement of the provisions of Rule G and the medical examination and employee assistance referral programs that were a long-standing practice and already in effect; (2) refine the methods of enforcing Rule G by providing for breath and urine tests for alcohol and drugs in reasonable cause and reasonable suspicion situations where CNW had a basis for believing a violation of Rule G may be present; and (3) provided for incorporating a drug screen into the routine medical examination to determine an employee's fitness for service. Exhibit 7 attached to Lundberg affidavit is a copy of ADU policy issued on March 17, 1986 [App. 293]. On August 15, 1990, the CNW modified its Rule G to also prohibit the presence of alcoholic beverages and drugs in the body fluids of employees on duty or on company property as shown by Exhibit 8 to Lundberg affidavit [App. 300]. That rule now reads as follows:

> "The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Presence of any alcohol, intoxicants, narcotics, marijuana or other controlled substances in the body fluids of employees while on duty or on company property is considered possession and is prohibited.
>
> Employees must not report for duty with the presence in their body fluids of any medication, including those prescribed by a doctor, that may in any way adversely affect the safe performance of their duties. Employees who are prescribed any drug or medication by a licensed physician (1) the possession of which is prohibited by law; (2) which belongs to the generic categories of narcotics, depressants, stimulants,

tranquilizers, hallucinogens or antidepressants; (3) which is assigned a registration number by the U.S. Food and Drug Administration not included in (2); or (4) any liquid containing alcohol, must obtain from the treating physician a written statement (which upon request, will be submitted by the employee to his supervisor) certifying that in the physician's opinion the drug or medication prescribed at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties."

11. On August 15, 1990, CNW modified its ADU policy to provide an opportunity for employees who have been dismissed for Rule G for the first time and who have been diagnosed as drug abusers to be reinstated upon petition. It also provided for the employee assistance director to issue instructions to employees regarding the conditions that must be met in order to be qualified for service and to monitor that compliance in accordance with those instructions as shown in Exhibit 9 attached to Lundberg affidavit [App. 302]. On April 27, 1986, CNW unilaterally amended its Rule G to include a provision prohibiting off-duty drug use by its employees. That provision provided as follows:

"Employees subject to call for duty, reporting for duty, on duty or on company property are prohibited from using or being under the influence of alcoholic beverages or intoxicants. Possession of alcoholic beverages or intoxicants is prohibited while on duty or on company property.

Employees shall not report for duty, be on company property or be on duty under the influence of, or use while on duty or on company property any drug or other substance that may in any way adversely affect their alertness, coordination reaction, response or safety. This prohibition includes prescription medications.

The illegal use, illegal possession or illegal sale of any drug by employees while on or off-duty is prohibited."

12. Following substantial litigation, the matter was settled with CNW reinstating its Rule G that existed prior to April 27, 1986, as shown by the settlement and stipulation of voluntary dismissal filed in the United States District Court for the District of Minnesota in Case No. 4-86-575 attached as Exhibit 10 to Lundberg affidavit [App. 309].

13. Upon issuance of the ADU policy on March 17, 1987, plaintiff BMWE as well as the Railway Labor Executives Association and 15 other CNW unions representing CNW employees filed an action in the United States District Court for the Eastern District of Michigan, Southern Division, seeking to declare and enjoin CNW's ADU policy as a violation of the mandatory bargaining provisions (major dispute provisions) of the Railway Labor Act. This litigation was transferred to the United States District Court for the District of Minnesota, Third Division. Following a series of court decisions, including the Supreme Court decision in *Consolidated Rail Corporation v. RLEA,* 109 S.Ct. 2477 (1989), which held, among other things, that issues of drug and alcohol policies and testing were minor disputes under the Railway Labor Act, the BMWE for and on behalf of its members, including all plaintiffs in these cases, entered into a stipulation to dismiss and settlement agreement in that case which provided among other things that BMWE's remedies (including those of its members) regarding actions taken under or changes to the ADU and Rule G policies were governed exclusively by the provisions of Railway Labor Act grievance procedures, 45 U.S.C. Section 153, as required by the collective bargaining agreements and the Railway Labor Act. The stipulation for dismissal with prejudice and settlement agreement are set forth as Exhibit 12 to Lundberg affidavit [Respondent's App. 8-14; Iowa Supreme Court App. 331-338]:

> "2. CNW recognizes the right of the plaintiffs pursuant to Section 153 of the RLA, subject to the assertion by CNW of any defenses it may have, including but not limited to time limits

> and statute of limitations defenses, to submit and/or progress claims and grievances as to whether CNW's prohibited by its collective bargaining agreements, express or implied, from taking actions in regard to CNW employees under the ADU policy or CNW's Rule G (including but not limited to return to service drug/alcohol screening, disciplinary action or medical disqualifications) or from making changes to the ADU policy or Rule.
>
> 3. Plaintiffs recognize that the remedies under RLA Section 153 referred to in paragraph 2 of this agreement are exclusive, except that this settlement agreement shall not waive any rights any of the parties may have under the RLA to seek judicial enforcement of an arbitration award, should the party prevail in an arbitration permitted under this settlement agreement, nor shall this agreement operate as a bar to either party seeking to have any subsequent arbitration award set aside for any reasons set forth in 45 U.S.C. Section 153, first and second."

[End of Excerpt Iowa District Court Undisputed Relevant Material Facts]

In addition to the Iowa District Court Findings set out immediately above, CNW points the Court to these three additional facts. (1) By the time of the District Court's Ruling, the dismissal of Appellants Menter and Smith for violation of Rule G had been upheld by the Special Board of Adjustment No. 924 pursuant to the Railway Labor Act. (Affidavit of Joan Harvieux, Iowa Supreme Court App. 263; Exh. F. and G to Defendant's Motion for Summary Judgment in Menter and Smith v. CNW, Cerro Gordo District Court No. 52635-0491, Iowa Supreme Court App. 119 and 123, respectively). (2) 49 CFR Ch. II, Subpart D, 209.301 and 209.303 require determination of an employee's fitness to perform safety sensitive functions and designate Maintenance of Way employees as performing safety sensitive functions. (3) The CNW's Alcohol and Drug Use Policy ("ADU") provides that an employee discharged on a first violation for alcohol who accepts counseling and completes any recommended rehabilitation program

can petition for reinstatement to employee status; an employee found responsible and subsequently dismissed for use of an illegal drug will not be reinstated. (Respondent's App. 1-5; Lundberg Aff. Ex. 9, Iowa Supreme Court App. 302-305).

SUMMARY OF ARGUMENT

Railroads, such as the Chicago and North Western Transportation Company (CNW), have historically issued and enforced work rules prohibiting or restricting use of alcohol and drugs. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n.*, 491 U.S. 299, 312, 314-316, 318-320, 105 L.Ed.2d 250, 109 S.Ct. 2477 (1989); Iowa District Court Ruling, Petitioners' App. 19-24. For purposes of administration of the Railway Labor Act (RLA), 45 U.S.C. § 151, et seq., the authority of the CNW to administer drug tests to its employees is a "minor dispute" to be submitted to arbitration before the National Railroad Adjustment Board. *Id.* at 491 U.S. 318-320. In a Stipulation for Dismissal and Settlement Agreement in the United States District Court for the District of Minnesota, the petitioners agreed that the remedies under Section 153 of the RLA are exclusive for alcohol and drug disputes. (Respondent's App. 1-5; Iowa District Court Ruling, petitioners' App. 22-24, 38).

The Petitioner employees seek as damages the wages lost because of discharge from employment with the CNW or delay in returning to work after furlough. These actions were taken by the CNW because of its determination that the employees were not qualified to work either because of failing a drug test or not having yet taken a drug test. The Railway Labor Act preempts a state law wrongful discharge action based on a railroad's alleged state law obligation to reinstate an employee to his job with pay following his injury in an automobile accident. *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320, 324, 92 S.Ct. 1562, 1565, 32 L.Ed.2d 95 (1972). Where an employee is discharged for alleged violation of railroad safety rules, a state action for damages is preempted by the Railway Labor Act. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369-1370 (9th Cir. 1978); *Jackson v. Consolidated Rail*

Corp., 717 F.2d 1045, 1049-1051, 1056-1057 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed.2d 233 (1984).

The Federal Rail Safety Act of 1970 (F.R.S.A.) was enacted to promote railroad safety. 45 U.S.C. § 421. The Secretary of Transportation was given broad powers to issue regulations and standards for all areas of railroad safety. 45 U.S.C. § 431(a). However, the powers given to the Secretary were not intended to prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the RLA relating to qualifications of employees, which are not inconsistent with the Secretary's regulations. 45 U.S.C. § 431(a). The Federal Railroad Administration of the United States Department of Transportation issued regulations designating maintenance of way employees as performing safety sensitive functions. 59 C.F.R. § 209.301 and § 209.303. These regulations do not preempt a railroad from initiating disciplinary proceedings and imposing disciplinary sanctions against its employees under its collective bargaining agreements or in the normal and customary manner. 59 C.F.R. § 209.301(c).

Iowa Code § 730.5 is more restrictive than the CNW's alcohol and drug use policy as to circumstances in which the railroad may drug test an employee. The savings clause in 45 U.S.C. § 434 governing preemption of state rail safety regulations does not apply to Iowa Code § 730.5 since it is a general labor statute not directed toward rail safety. When the RLA and the F.R.S.A. are read together, the conflict with federal law created by enforcing Iowa Code § 730.5 is obvious and contrary to the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. The plan of Congress to leave determination of safety-related employee qualifications to regulation by the Secretary and to rail carriers and unions in their historical roles under collective bargaining agreements should not be frustrated by enforcement of a state general labor statute that is less stringent than railroad work rules affecting rail safety.

ARGUMENT

I. The Railway Labor Act and The Federal Rail Safety Act of 1970, Individually And When Read Together, Preempt Enforcement of Iowa Code § 730.5 Against the Chicago and North Western Transportation Company, a Rail carrier in Interstate Commerce.

The Iowa District Court ruled that Petitioners' claim alleging violation of Iowa Code § 730.5 is preempted by the Railway Labor Act, 45 U.S.C. §§ 151-188 (R.L.A.). The Iowa Supreme Court did not reach that issue since it ruled Petitioners' claim was preempted by the Federal Railroad Safety Act of 1970 (F.R.S.A.), 45 U.S.C. §§ 421-447. One thing is clear: when the R.L.A. and the F.R.S.A. are read together, the conflict with federal law created by enforcing Iowa Code § 730.5 against an interstate rail carrier is obvious and contrary to the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. Iowa Code, § 730.5, is a general labor statute never intended and not directed toward promoting railroad safety. The role of the R.L.A. in promoting railroad safety by controlling use of alcohol and drugs by railroad employees will be discussed first and its preemptive effect explained. Next, the F.R.S.A. will be discussed and its preemptive effect explained.

a. The Railway Labor Act.

45 U.S.C. § 153(i) provides that disputes between an employee and a rail carrier growing out of grievances or out of interpretation or application of agreements concerning rules or working conditions which are not resolved by agreement between the employee and the carrier may be referred by petition of either party to the National Railroad Adjustment Board. Awards of the Adjustment Board are final and binding upon both parties to the dispute. 45 U.S.C. § 153(m). An Adjustment Board award may be appealed to the United States District Court, but on review the findings and order of the Adjustment Board are conclusive and the award may be set aside only for failure of the Adjustment Board to comply with the requirements of 45 U.S.C. § 151-188, for failure of the

award to confine itself to matters within the occupational jurisdiction of the particular division of the Adjustment Board making the award, or for fraud or corruption by a member of the division making the order. 45 U.S.C. § 153(q).

The Union and employees' dispute with the CNW grows out of a grievance or interpretation or application of the collective bargaining agreement concerning rules or working conditions. *International Association of Machinists v. Central Air Lines, Inc.*, 373 U.S. 682, 692, 83 S.Ct. 956, 10 L.Ed. 2d 67, 75, rehearing denied, 373 U.S. 947, 83 S.Ct. 1533, 10 L.Ed. 2d 702 (1963), states:

> A union agreement made pursuant to the Railroad Labor Act has, therefore, the imprimatur of the federal law upon it. That is, the section 204 contract, like the Labor Management Relations Act Section 301 Contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts.

The employees seek as damages the wages lost because of discharge from employment with the CNW (Menter, Smith, Waldeier, Gildea and Scarberry) or delay in returning to work after furlough (Otis, Ewoldt, Cook, and Halladay). These are actions for wrongful discharge and state courts are without jurisdiction to entertain such an action brought by an employee against a rail carrier. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324-26, 92 S.Ct. 1562, L.Ed. 2d 95 (1972); *Swanigan v. Western Air Lines, Inc.*, 396 N.W.2d 607, 610-611 (Minn. App. 1986); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1054, 1056-57 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed. 2d 233 (1984); *Majors v. U. S. Air. Inc.*, 525 F. Supp. 853, 856-857 (D. Md. 1981); *Pandil v. Illinois Central Gulf Railroad Co.*, 312 N.W.2d 139, 141-144 (Iowa App. 1981); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369-1370 (9th Cir. 1978).

"A Plaintiff may not avoid the mandatory arbitration process by asserting a state cause of action. Artful pleading cannot

disguise what is truly a minor dispute under the RLA." *Santonti Roia v. Iberia Lineas Aereas De Espana,* 688 F. Supp. 810, 813 (D. Puerto Rico 1988).

The railroad employee in *Magnuson v. Burlington Northern, Inc.,* 576 F.2d 1367, 1369-1370 (9th Cir. 1978) was discharged as a result of a hearing on alleged railroad rules violations he committed in connection with a train collision. The employee claimed damages for emotional distress, and lost wages and benefits. He claimed his discharge from employment resulted because of a conspiracy among employees having evil motivations and wishing to cover up the guilty acts of other employees of the rail carrier. The *Magnuson* court held the employee's claim was a "minor dispute" within the exclusive province of the grievance mechanisms established by the Railway Labor Act. 576 F.2d 1369-1370. The employee's claim for lost wages and benefits resulted because of his discharge from employment, and the court also explained that the employee's alleged emotional distress damages likewise grew out of the fact he was allegedly wrongfully discharged. Reasoning that if the employee had not been discharged, or if his discharge was not wrongful, the railroad employee's alleged evil motivations would not create any legal injury, and thus the Court held that all of plaintiff's claims were for wrongful discharge and were preempted by the Railway Labor Act. 576 F.2d 1369-1370.

In *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed. 2d 233 (1984), the employee was discharged for violation of railroad safety rules. The 7th Circuit Court of Appeals held Plaintiff's claim fell within an area of inquiry preempted by the Railway Labor Act and dismissed Plaintiff's state law tort claim for lack of subject matter jurisdiction. 717 F.2d 1054, 1056-57. The Court in *Jackson* distinguished those few cases allowing an employee to pursue an action in court based on a specific *federal* statutory right without going to the National Railroad Board of Adjustment. The Court said those cases do not support the right of an employee to sidestep the Railway Labor Act when the employee is pursuing a claim based on a state statutory right. That court, dealing with

discharge for violation of railroad safety rules, held a state law right is not sufficient to rebut preemption by the Railway Labor Act. 717 F.2d 1049-1051.

For many years the Transportation Company has had in effect Rule G of the General Code of Operating Rules, or its predecessor rule. Rule G states:

> The use of alcoholic beverages, intoxicants, drugs, narcotics, marijuana or controlled substances by employees subject to duty, when on duty or on company property is prohibited. Employees must not report for duty, or be on duty or have in their possession while on company property, any drug, alcoholic beverage, intoxicant, narcotic, marijuana, medication, or other substance, including those prescribed by a doctor, that will in any way adversely effect their alertness, coordination, reaction, response or safety.

Further, Rule I of the General Code of Operating Rules provides:

> Employees must exercise care to prevent injury to themselves or others. They must be alert and attentive at all times when performing their duties and plain their work to avoid injury.

In *Consolidated Rail Corporation v. Railway Labor Executives' Association,* 491 U.S. 299, 105 L.Ed.2d 250, 109 S.Ct. 2477 (1989), a railroad unilaterally decided to require urinalysis drug screening as part of all periodic and return-from-leave physical examinations. This Court held that the Railway Labor Act (RLA), 45 U.S.C.A. 151, et seq., required employees disputing a railroad's unilateral decision on drug testing to pursue the dispute through the arbitration process set up by the RLA for determining "minor disputes". 491 U.S. at 320, 105 L.Ed.2d at 272.

In *Consolidated Rail,* an unincorporated association of the chief executive officers of 19 labor organizations which collectively represented the railroad's employees filed suit in the United States District Court for the Eastern District of Pennsylvania claiming that the railroad's unilateral announcement in 1987 that urinalysis drug screening would be hence forth

included as a part of all periodic and return-from-leave physical examinations was a "major dispute" and that the urinalysis drug screening therefore could not be implemented by the railroad unless it obtained the right to do so after going through the collective bargaining agreement process. This Court said at 491 U.S. 312:

> The essential facts regarding Conrail's past practices – the facts in support of the positions of both Conrail and the Union – are not disputed. Since its founding in 1976, Conrail routinely has required its employees to undergo physical examinations under the supervision of its Health Services Department. The parties agreed in the Court of Appeals, and the District Court found, that Conrail's authority to conduct physical examinations is an implied term of the collective-bargaining agreement, established by long-standing past practice and acquiesced in by the Union . . .

This Court explained at 491 U.S. 314-316:

> The problem of drug use has been addressed by Conrail not only as a medical concern, but also as a disciplinary one. The Court noted earlier in the present Term that the railroad industry has adopted operating "Rule G," which governs drug use by employees. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. ___, ___, 103 L.Ed.2d 63, 109 S.Ct. 1402 (1989). As currently implemented by Conrail, Rule G provides: "The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited. Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties." *See* App. 63. At Conrail, as elsewhere in the industry, an employee may be dismissed for violating Rule G. *Skinner,* 489 U.S., at ___, 103 L.Ed. 2d 639, 109 S.Ct. 1402; Tr. of Oral Arg. 43. Conrail has relied chiefly on supervisory observation to enforce Rule G. An employee suspected of drug or alcohol use is

encouraged voluntarily to agree to undergo diagnostic tests, but is not required to do so.

In addition, Conrail has implemented the Federal Railroad Administration regulations recently upheld in *Skinner* against a Fourth Amendment challenge. Since March 1986, Conrail has required all employees covered by the Hours of Service Act, 45 U.S.C. 61 et seq. [45 U.S.C.S. 61 et seq.], to undergo post-accident drug and alcohol testing, pursuant to 49 C.F.R. 219 et seq. (1988).

The dispute between the parties focuses on the meaning of these past practices. Conrail argues that adding urinalysis drug testing to its periodic and return-to-duty physicals is justified by the parties' implied agreement regarding physical examinations, as indicated by their long-standing practice of permitting Conrail unilaterally to establish and change fitness-for-duty standards, to revise testing procedures, and to remove from service employees who are deemed unfit for duty under those standards and testing procedures. Conrail contends, specifically, that past practice reflects that drug use has been deemed relevant to job fitness, and that Conrail's physicians have the discretion to utilize drug testing as part of their medical determination of job fitness. The expansion of drug testing in February 1987, Conrail argues, represents no more than a diagnostic improvement in its medical procedures, similar to diagnostic improvements Conrail unilaterally made in the past . . .

The Court continued at 491 U.S. 318-320:

Conrail's well-established recognition of the relevance of drug use to medical fitness substantially weakens the Union's claim that Conrail now, for the first time, is engaging in medical testing that reveals facts about employees' private off-duty conduct. Indeed, the fact that medical testing often detects physical problems linked to off-duty behavior makes it difficult to draw a bright line for jurisdictional

> purposes between testing which does and that which does not reflect upon private conduct . . .
>
> The fact that for drug problems, unlike other medical conditions, Conrail's standards include a fixed time period in which the employee's condition must improve, does serve to distinguish Conrail's drug policy from its response to other medical problems. Conrail has argued that it needs, for medical purposes, to require employees who deny that they are drug-dependent to demonstrate that they are capable of producing a drugfree sample at will. Tr. of Oral Arg. 13. In our view, that argument has sufficient merit to satisfy Conrail's burden of demonstrating that its claim of contractual entitlement to set a time limit for successful recovery from drug problems is not frivolous.
>
> Because we conclude that Conrail's contractual arguments are not obviously insubstantial, we hold that the case before us constitutes a minor dispute that is within the exclusive jurisdiction of the Board.

As a matter of common sense the experienced railroad personnel representing both labor and management on the arbitration panels should determine whether a railroad's rules and working conditions relating to alcohol and drugs are proper and justify employees' discharge from or delay of employment. The parties in the present case even stipulated in an earlier lawsuit that the RLA, 45 U.S.C. § 153, provides the exclusive remedy for alcohol and drug disputes. (Respondent's App. 1-5; Lundberg Affidavit, Exh. 10, 11 and 12, Iowa Supreme Court App. 309, 311 and 331, respectively; Iowa District Court Ruling, Findings of Fact, ¶¶ 12 and 13, pp 7-8, Petitioner's App. 22-24). The Iowa District Court Ruling states (Petitioner's App. 38):

> The parties have agreed in the settlement agreements in the Minnesota district court that plaintiffs recognize that the remedies under RLA Section 153 are exclusive based upon the United States Supreme Court's recent holding in the *Consolidated Rail* case.

That settlement agreement ended litigation between the CNW and the Brotherhood of Maintenance of Way Employees that

had been commenced in the U.S. District Court for the Eastern District of Michigan and later transferred to the U.S. District Court for the District of Minnesota. The settlement agreement provided:

> 2. CNW recognizes the right of the plaintiffs pursuant to Section 153 of the RLA, subject to the assertion by CNW of any defenses it may have, including but not limited to time limits and statute of limitations defenses, to submit and/or progress of claims and grievances as to whether CNW is prohibited by its collective bargaining agreements, express or implied, from taking actions in regard to CNW employees under the ADU policy or CNW's Rule G (including but not limited to return to service drug/alcohol screening, disciplinary action or medical disqualifications) or from making changes to the ADU policy or Rule G.
>
> 3. Plaintiffs recognize that the remedies under RLA Section 153 referred to in paragraph 2 of this agreement are exclusive, except that this settlement agreement shall not waive any rights any of the parties may have under the RLA to seek judicial enforcement of an arbitration award, should the party prevail in an arbitration permitted under this settlement agreement, nor shall this agreement operate as a bar to either party seeking to have any subsequent arbitration award set aside for any reasons set forth in 45 U.S.C. Section 153, first and second.

Iowa recognizes the doctrine of *Res Judicata. Goolsby v. Derby,* 189 N.W.2d 909, 913-914 (Iowa 1971); *B&B Asphalt Co. v. T.S. McShane Co.,* 242 N.W.2d 279, 286 (Iowa 1976). However, this defense was not ruled upon by the Iowa District court or the Iowa Supreme Court since they ruled in favor of the CNW on the basis of federal preemption. Nevertheless, it stands as a reason these Petitioners should not be granted a writ of certiorari.[1]

---

[1] The employee Petitioners derive any rights they have to employment, pay and benefits from the Collective Bargaining Agreement negotiated by their union,

The Secretary has known that rail carriers, unions and employees have been operating under the carriers' work Rule G and dealing with drug testing issues under the RLA arbitration provisions governing minor disputes. The Secretary issued regulations requiring the determination of an employee's fitness to perform safety-sensitive functions (which include maintenance of way functions). 49 C.F.R. Ch. II, Subpart D, § 209.301 and 209.303. The Secretary specifically provided in § 209.301(c) that rail carriers could continue to discipline employees for violations of work rules:

> This subpart does not preempt a railroad from initiating disciplinary proceedings and imposing disciplinary sanctions against its employees, including managers and supervisors, under its collective bargaining agreements or in the normal and customary manner. Disqualification determinations made under this subpart shall have no effect on prior or subsequent disciplinary actions taken against such employees by railroads.

Thus, the Secretary's own regulations on disqualifications of employees for safety reasons provide they are not to impinge on the carriers' own efforts through work rules and collective bargaining agreements to promote safety by disciplinary action against employees. This is a clear recognition of Congress' obvious intent expressed in 45 U.S.C. § 431(a), and the absence of amendment to the Railway Labor Act, that rail carriers continue addressing safety precautions through Railway Labor Act administrative proceedings. There is no reason

---

the BMWE. While in this case the employees are in privity with the BMWE, privity is not even required where, as here, issue preclusion is raised defensively against parties so connected in interest with a party in the former action as to have had full and fair opportunity to litigate the relevant issue. *In the Matter of Evans,* 267 N.W.2d 48 (Iowa 1978). All the railroad unions litigated this issue in the former action on behalf of their members, including the members of the Petitioner employees' union, the BMWE. Since the defendant in this action has raised the defense of *Res Judicata,* Petitioners should not be permitted to relitigate this issue which has been thoroughly treated and disposed of in the much more intensive earlier case commenced in Michigan and transferred to the United States District Court for Minnesota.

to believe Congress intended to permit a State's general labor statute (not specifically addressing rail safety) to undermine a rail carriers' efforts to promote rail safety through work rules subject to challenge and review under the Railway Labor Act.

The Railroad should not be required to have different work rules and working conditions relating to drugs and alcohol in different states when the Railway Labor Act contemplates arbitration of such work rules and working conditions in a manner that provides relative uniformity of decisions.

b. The Federal Rail Safety Act of 1970.

Congress enacted the F.R.S.A. "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons . . . " 45 U.S.C. § 421; *CSX Transportation, Inc. v. Easterwood,* 113 S.Ct. 1732, 1736, ___ U.S. ___, 123 L.Ed.2d 387 (1993). This Court in *CSX Transportation,* at 113 S.Ct. 1736-1737 further explained:

> In addition, the Secretary is given broad powers to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . . " Sec. 431(a). The pre-emptive effect of these regulations is governed by Sec. 434, which contains express saving and pre-emption clauses. Thus, the States are permitted to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." Even after federal standards have been promulgated, the States may adopt more stringent safety requirements "when necessary to eliminate or reduce an essentially local safety hazard," if those standards are "not incompatible with" federal laws or regulations and not an undue burden on interstate commerce.

As the Iowa Supreme Court observed in its April 20, 1994, Amendment (Petitioner's App. 13-14) to its March 23, 1994 Opinion, Iowa Code § 730.5 is a general labor statute and not a

state railroad safety regulation. The 45 U.S.C. § 434 savings clause therefore does not catch § 730.5. In fact, it will be seen the enforcement of § 730.5 against the CNW results in blocking discipline of railroad employees that is sanctioned by the R.L.A. and the F.R.S.A. as a means of promoting safety by deterring alcohol and drug use in safety sensitive positions.

The Federal Railroad Administration of the United States Dept. of Transportation has designated Maintenance of Way employees as performing safety sensitive functions. 59 C.F.R. Ch. II, Subpart D, 209.301 and 209.303 provides:

> § 209.301
>
> (a) This subpart prescribes the rules of practice for administrative proceedings relating to the determination of an individual's fitness for performing safety-sensitive functions under 209(f) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 438(f)).
>
> (b) The purpose of this subpart is to prevent accidents and casualties in railroad operations that result from the presence in the work force of railroad employees, including managers and supervisors, and agents of railroads who have demonstrated their unfitness to perform the safety-sensitive functions described in 209.303 by violating any rule, regulation, order or standard prescribed by FRA. Employees and agents who evidence such unfitness may be disqualified, under specified terms and conditions, temporarily or permanently, from performing such safety-sensitive functions.
>
> (c) This subpart does not preempt a railroad from initiating disciplinary proceedings and imposing disciplinary sanctions against its employees, including managers and supervisors, under its collective bargaining agreements or in the normal and customary manner. Disqualification determinations made under the subpart shall have no effect on prior or subsequent disciplinary actions taken against such employees by railroads.
>
> § 209.303 coverage.
>
> (a) Railroad employees who are assigned to perform service subject to the Hours of Service Act (45

U.S.C. 61-64b) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service.

(b) Railroad employees or agents who:

(1) Inspect, install, repair or maintain track and roadbed;

(2) Inspect, repair or maintain locomotives, passenger cars, and freight cars;

(3) Conduct training and testing of employees when the training or testing is required by the FRA's safety regulations; or

(c) Railroad managers, supervisors or agents when they:

(1) Perform the safety-sensitive functions listed in paragraphs (a) and (b) of this section;

(2) Supervise and otherwise direct the performances of the safety-sensitive functions listed in paragraphs (a) and (b) of this section; or

(3) Are in a position to direct the commission of violations of any of the requirements of parts 213 through 236 of this title.

Hawaiian Airlines, Inc. v. Norris, 114 S.Ct. 2239, 2247-50, ___ U.S. ___ (June 20, 1994), this Court's most recent case addressing the issue of preemption of state law claims by the Railway Labor Act, was a retaliatory discharge case. The employee aircraft mechanic refused to sign a work record indicating a repair had been performed satisfactorily because it was his opinion additional work that was required to ensure safety had not been completed. The question under the state law claim was whether the employers' motive in discharging the employee was to deter or interfere with his exercise of rights under Illinois workers' compensation law. 114 S.Ct. at 2248.

Retaliatory discharge is not at issue in the present case. In this case, the CNW, and federal law, are attempting to set requirements that promote national railroad safety under both

the Railway Labor Act and the Federal Rail Safety Act of 1970, while the effect of Iowa Code § 730.5 in this limited factual arena is to water down those efforts towards safety. In *Hawaiian Airlines,* the effect of the employee prevailing on his state law claim would be to enhance airline safety. *Missouri Pacific R. Co. v. Norwood,* 283 U.S. 249, 258, 51 S.Ct. 458, 462, 75 L.Ed. 1010 (1931) and *Terminal Railroad Ass'n of St. Louis v. Brotherhood of Railroad Trainmen,* 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571 (1943), cases denying federal preemption, each involved state laws promoting workplace safety.

However, in *Andrews v. Louisville & N.R. Co.,* 406 U.S. 320, 324, 92 S.Ct. 1562, 1565, 32 L.Ed.2d 95 (1972), the question was the extent to which the railroad was obligated to reinstate the employee in his job with pay following his injury in an automobile accident. The court in *Andrews* determined that the extent of any such obligation on the part of the railroad depended upon interpretation of the collective bargaining agreement and held that therefore the state law wrongful termination claim was preempted by the Railway Labor Act. In the present case railroad employees have had an historical obligation under their collective bargaining agreements to comply with certain work rules governing alcohol and other drugs and to submit to discipline under their CBA (subject to procedural protections of the Railway Labor Act for violation of such rules). *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n,* 491 U.S. 299, 312-20, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989). (Iowa District Court Ruling, Petitioners' App. 19-24; Lundberg Aff., Iowa Supreme Court App. 267-274.)

Iowa Code § 730.5 is more restrictive than the CNW's alcohol and drug use policy as to circumstances in which the railroad may drug test an employee. For example, the CNW drug tests an employee after any accident, injury, rule violation, or unsafe act "in which human error may reasonably have been a factor . . . " (Respondents' App. 1-5; Lundberg Aff., Ex. 9; Iowa Supreme Court App. 302-304.) Section 730.5(3)(a) permits testing only where "The employer has probable cause to believe that an employee's faculties are impaired on the job." Further, § 730.5(3)(f) permits a drug test under the above circumstance only if the employer takes no disciplinary action

against an employee on account of his first discovered drug involvement if the employee undergoes substance abuse evaluation and treatment. The CNW does discipline employees on a first discovered drug involvement, but in cases not involving illegal drugs allows them to complete recommended evaluation and treatment and petition for reinstatement.

Congress recognized that rail carriers historically had promoted safety under collective bargaining agreements by using safety as a factor in determining qualifications for employees. It therefore provided in 45 U.S.C. § 431(a):

> . . . However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act [45 U.S.C.A. Sec. 151 et seq.], including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be construed to give the Secretary authority to issue rules, regulations, orders, and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

The plan of Congress to leave determination of safety related employee qualifications to regulation by the Secretary and to rail carriers and unions in their historical roles under CBA's should not be frustrated by enforcement of a state general labor statute that is less stringent than railroad work rules affecting rail safety.

CONCLUSION

The Ruling of the Iowa Supreme Court is not in conflict with the decision of another state court of last resort or of a United States Court of Appeals. Nor does the Ruling decide an important federal question that has not been settled by this Court or conflict with applicable decisions of this Court. Iowa Code § 730.5, a state general labor statute, should not be enforced to require less stringent standards for drug and alcohol testing than permitted under the Federal Rail Safety Act of

1970 and subject to challenge and review under the Railway Labor Act.

WHEREFORE, Respondent Chicago and North Western Transportation Company prays that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

BRUCE E. JOHNSON
LEWIS, WEBSTER, JOHNSON,
VAN WINKLE & DEVOLDER
620 Liberty Building
418 Sixth Avenue
Des Moines, IA 50309
Telephone: (515) 243-1000

Counsel for Respondent

APPENDIX

EXHIBIT 9

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ALCOHOL AND DRUG USE POLICY

The Chicago and North Western Transportation Company is committed to maintaining a safe working environment and to promoting productivity by ensuring that its employees are drug-free and do not abuse alcohol. The company has three programs for that purpose applicable to all employees, including officers and employees whose positions are covered by collective bargaining agreements: (a) the Rule "G" Program, (b) the Employee Assistance Program, and (c) and Medical Examination Program.

1. THE RULE "G" PROGRAM

The Company requires all employees, including officers and employees whose positions are covered by collective bargaining agreements, to comply with the provisions of the applicable General Rule "G". Employees covered by the Hours of Service Act shall also be governed by the FRA Rule on Control of Alcohol and Drug Use in Railroad Operations.

(a) Testing – Reasonable Cause

Whenever an employee is involved in an accident, an on-the-job injury, a rule violation, or an unsafe act, in which human error may reasonably have been a factor, a supervisor may require the employee to submit to a urine and/or breath test. When an employee working as part of a crew, a gang, or a group of employees is

involved in an accident, an on-the-job injury, a rule violation, or an unsafe act, a supervisor may require some or all members of the employee's group to submit to a urine and/or breath test if, but only if, individual responsibility is not clear and human error by the other employees required to submit to the test may reasonably have been a factor. An employee's refusal to take the test will be handled under the discipline system as an act of insubordination.

(b) Testing – Reasonable Suspicion

Whenever a supervisor has reasonable grounds to suspect that an employee is violation Rule "G" (two or more supervisors when drugs are involved), the supervisor may require the employee to submit to a urine and/or breath test. If an employee is suspected of using alcohol, breath testing is the preferred means of confirmation. If the employee refuses the test, the supervisor will utilize physical observation and/or other evidence to determine if the employee should be charged with a violation of rule "G". The refusal of the employee to take the applicable test will be handled under the discipline system as an act of insubordination.

(c) G.C./M.S. Test

For the purpose of determining the presence of prohibited substances, the Company will act only upon the results of a gas chromatography/mass spectrometry test performed by a reputable independent laboratory.

(d) FRA Testing Procedures

Employees covered by the Hours of Service Act shall also be governed by the testing provisions of the above-mentioned FRA Rule.

(e) Discipline

Any employee found responsible for violation of rule "G" will be subject to dismissal.

(f) Medical Disqualification

If a test discloses the presence of prohibited substances under circumstances that do not constitute a violation of Rule "G", the Company may medically disqualify the employee until an evaluation is completed to determine whether or not the employee has a drug and/or alcohol problem. If a drug and/or alcohol problem is diagnosed, the Medical Director will then determine if the alcohol and/or drug problem is under control before medically qualifying the employee to return to work.

(g) Blood Tests

Whenever (1) the Company requires an employee to submit to a urine test or (2) a breath test is positive, the Company will afford the employee an opportunity to provide a concurrent blood sample. If the employee declines to submit a blood sample and if the employee's urine sample discloses the presence of a prohibited substance, the Company will presume that the employee was under the influence of that

substance while on duty or on Company property within the meaning of Rule "G".

(h) Reinstatement

Any employee dismissed from service for using alcohol in violation of Rule "G" who wishes to be considered for reinstatement must first contact the Employee Assistance Program counselor for an interview and then must comply with the counselor's recommendations and instructions. If there is no diagnosis of alcohol abuse in the case, the employee, upon the expiration of one year, may petition the Company for a leniency reinstatement. The Company will consider that petition in light of all relevant factors including the employee's prior record. An employee violating Rule "G" for a second time (whether diagnosed as an alcohol abuser or not) will not be considered for a leniency reinstatement.

(i) Reinstatement – Alcohol Abusers.

If the counselor has diagnosed the employee as an alcohol abusers [sic], the employee must complete medical treatment to the satisfaction of the Employee Assistance Program and maintain abstinence, and the Medical Department after examination must reasonably believe that the employee has control of the employee's alcohol problem, before the employee may petition the Company for a leniency reinstatement. The company will consider that petition in light of all relevant factors.

(j) No Reinstatement – Drug Offenses

The Company will not consider for reinstatement an employee who has been found responsible and subsequently dismissed for drug-related violation of a Company rule or for insubordination arising from a refusal to take a required test.

(k) Prescription Drugs

If a test discloses the presence of a medication which might adversely affect an employee's alertness, coordination, reaction, response or safety and which the employee was taking pursuant to a physician's prescription, the employee shall be held responsible for violation of Rule "G" unless the employee has previously notified the appropriate supervisor and has presented that supervisor with a letter from a physician stating that the physician believes that the medication will not adversely affect the employee's alertness, coordination, reaction, response or safety. If the Company, after a thorough review of the matter, does not accept the physician's opinion, the company may medically disqualify the employee until it is medically appropriate for the employee to discontinue the medication.

2. THE EMPLOYEE ASSISTANCE PROGRAM

The Company maintains an active Employee Assistance Program, consisting of three parts: (a) voluntary referral, (b) co-worker report referral, and (c) management referral.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

RAILWAY LABOR EXECUTIVES' ASS'N, ET AL., *Plaintiffs,* v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *Defendant.*	Case No. 3-88-409 Hon. Edward J. Devitt

STIPULATION FOR DISMISSAL WITH PREJUDICE

(Filed July 21, 1990)

The above-entitled action having been settled (see Exhibit A attached hereto),

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, through their respective counsel, that this action against the Chicago & North Western Transportation Company be and hereby is dismissed with prejudice and on the merits, but without further costs to any of the parties.

IT IS FURTHER STIPULATED AND AGREED, that this dismissal with prejudice shall not operate as a bar to any rights any party may have with respect to seeking enforcement of a subsequent arbitration award relating to the subject matter of this litigation; nor shall this dismissal with prejudice operate as a bar to either party

seeking to have any subsequent arbitration award set aside for any reason set forth in 45 U.S.C. § 153 First and Second.

ALPER & MANN

By: /s/ Lawrence M. Mann
Lawrence M. Mann
Suite 811
400 First Street, N.W.
Washington, D.C. 20001
(202) 298-9191

Date: July 27, 1990

Attorneys for Plaintiffs

SHEA & GARDNER

By: /s/ Ralph J. Moore, Jr.
Ralph J. Moore, Jr.
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Date: July 27, 1990

Attorneys for Defendant

Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

RAILWAY LABOR EXECUTIVES' ASS'N, ET AL., *Plaintiffs,* v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *Defendant.*	Case No. 3-88-409 Hon. Edward J. Devitt

SETTLEMENT AGREEMENT

Recitals.

A. Plaintiffs commenced an action against the Chicago & North Western Transportation Company ("C&NW") seeking declaratory and injunctive relief. Plaintiffs sought a declaration that C&NW's addition of a drug/alcohol screening component to its physical examinations and other aspects of C&NW's Alcohol and Drug Use Policy ("ADU Policy") gave rise to a major dispute under the Railway Labor Act ("RLA") over which the parties were obligated to bargain. Pending resolution through such bargaining, the plaintiffs sought a status quo injunction prohibiting C&NW from implementing its ADU Policy.

B. C&NW denies the allegations that the drug/alcohol screening addition or other aspects of the ADU policy presented major disputes requiring bargaining.

C. On June 19, 1989, the United States Supreme Court issued its opinion in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989), addressing some or all of the issues between the parties.

D. C&NW and Plaintiffs hereby advise the Court that they have agreed to settle Case No. 3-88-409. Based on the terms of this Settlement Agreement, Plaintiffs hereby request this Court to enter an order dismissing Case No. 3-88-409.

E. To settle this litigation, the parties have agreed to the terms set forth below.

Agreement.

The parties, by mutual promises, and desiring to be legally bound, agree as follows:

1. Plaintiffs shall agree to dismiss the pending litigation with prejudice and on the merits. Concurrent with the execution of this Settlement Agreement, the parties will execute and file with the Court a Stipulation for Dismissal with Prejudice.

2. C&NW recognizes the right of the Plaintiffs pursuant to section 153 of the RLA, subject to the assertion by C&NW of any defenses it may have, including but not limited to time limits and statutes of limitations defenses, to submit and/or progress claims and grievances as to whether C&NW is prohibited by its collective bargaining agreements, express or implied, from taking actions in

regard to C&NW employees under the ADU Policy or C&NW's Rule G (including but not limited to return-to-service drug/alcohol screening, disciplinary action or medical disqualifications) or from making changes to the ADU Policy or Rule G.

3. Plaintiffs recognize that the remedies under RLA § 153 referred to in Paragraph 2 of this Agreement are exclusive, except that this Settlement Agreement shall not waive any rights any of the parties may have under the RLA to seek judicial enforcement of an arbitration award, should the party prevail in an arbitration permitted under this Settlement Agreement, nor shall this agreement operate as a bar to either party seeking to have any subsequent arbitration award set aside for any reason set forth in 45 U.S.C. § 153 First and Second.

4. All parties shall bear their own costs of this litigation.

This Settlement Agreement entered into this 27th day of July, 1990.

ALPER & MANN

By: /s/ Lawrence M. Mann
Lawrence M. Mann
Suite 811
400 First Street, N.W.
Washington, D.C. 20001
(202) 298-9191

Attorneys for Plaintiffs

SHEA & GARDNER

By: /s/ Ralph J. Moore, Jr.
Ralph J. Moore, Jr.
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,

Plaintiffs,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,

Defendant.

_____/

Case No. 4-86-575

Hon. James J. Rosenbaum

SETTLEMENT AND STIPULATION OF VOLUNTARY DISMISSAL

Pursuant to Federal Rule of Civil Procedure 41, Plaintiffs hereby voluntarily dismiss the Complaint and Amended Complaint in this matter without prejudice, each side to bear its own costs, in consideration of the following settlement:

1. Defendant Chicago & North Western Transportation Company ("C&NW") will withdraw the version of Rule G promulgated on April 27, 1986 ("New Rule G") and will reinstate the version of Rule G in effect immediately prior to April 27, 1986 ("Former Rule G").

2. C&NW will not attempt to reinstitute the off-duty, off-company property proscription of "New Rule G," except through procedures under §6 of the Railway Labor Act, 45 U.S.C. §156, or as otherwise provided for by law or regulation. This agreement does not limit the

carrier's right to take any action permitted by Former Rule G, including the right to discipline employees for conduct on duty or on company property, or for coming onto duty or ont [sic] company property, in circumstances that would violate Former Rule G.

3. All pending discipline cases under "New Rule G" will be processed as if they arose under "Former Rule G." If there are any non-operating employes who have been disciplined under "New Rule G" for off-duty, off-property use, possession, or sale of illegal drugs and whose disciplines have been sustained solely on that ground by adjustment boards under §3 of the Railway Labor Act, the parties will resubmit those employees' claims to such boards for reconsideration under "Former Rule G."

KLIMIST, McKNIGHT, SALE &
McCLOW, P.C.

By: /s/ Roger J. McClow
ROGER J. McCLOW
Attorney for Plaintiffs
26211 Central Park Blvd.
Suite 614
Southfield, Michigan 48076
(313) 354-9650

Dated: 1/27/89

SHEA & GARDNER

By: /s/ Ralph J. Moore, Jr.
RALPH J. MOORE, JR.
Attorney for Defendant
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Dated: 1/31/89

PETERSON, ENGBERG & PETERSON

BY /s/ William F. Garber
William F. Garber
700 Title Insurance Building
Minneapolis, MN 55401
(612) 338-6743

ATTORNEYS FOR PLAINTIFFS

Dated: February 15, 1989

LINDQUIST & VENNUM

BY /s/ Thomas E. Glennon
Edward M. Glennon
Thomas E. Glennon
4200 IDS Center
Minneapolis, MN 55402
(612) 371-3211

ATTORNEYS FOR DEFENDANT

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No. 94-152

In The

Supreme Court of the United States

October Term, 1994

DAVID C. OTIS, et al.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Iowa Supreme Court

REPLY BRIEF TO BRIEF IN OPPOSITION

HARRY W. ZANVILLE
ZANVILLE AND ZIMMERMANN
3116 Brockway Road
P.O. Box 426
Waterloo, IA 50704
(319) 232-1404

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Introduction

The Iowa Supreme Court retroactively applied field preemption based on inferences of Congressional intent drawn from Federal Railway Administration ("FRA") regulations and inherent, but unexercised, powers of the Secretary of Transportation. Its indefensible misapplication of federal preemption principles and refusal to defer to the FRA's official opinion resulted in Petitioners' articulation of three important legal questions (and subset issues) in the Petition for Writ of Certiorari.

Virtually admitting its indefensibility, the CNW made no effort to defend the actual basis of the Iowa Supreme Court decision. Please consider that: (1) the CNW never refers to the fact that the FRA issued a legal opinion finding that its regulations do ***not*** preempt Iowa law; (2) the CNW never addresses the deference required to be given to federal agency opinions in preemption cases; (3) the CNW makes no argument related to the validity of retroactive regulatory preemption; and (4) the CNW never discusses the issue of field preemption based on unexercised authority.

Instead, the CNW's Brief in Opposition asserts strict limits on the applicability of *Norris v. Hawaiian Airlines, Inc.*, ___ U.S. ___ (1994) and raises yet another alternate theory of preemption based on the combination of *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299 (1989) ("Conrail"), and the Federal Rail Safety Act ("FRSA").

2. The RLA, the FRSA, or the combination of both, do not preempt Iowa Code § 730.5.

Congress "has never exercised authority to occupy the entire field of labor legislation," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985), never intended to preempt the regulation of working conditions and has not preempted the states from enacting valid legislation in these fields. *Terminal Railroad Ass'n v. Railroad Trainmen*, 318 U.S. 1, 6-7 (1943); *Metropolitan Life Ins., Co. v. Massachusetts*, 471 U.S. 724, 757 (1985).

In last Term's decision in *Norris v. Hawaiian Airlines, Inc.*, ___ U.S. ___ (1994), the Court held that the RLA does not preempt state laws creating causes of action independent of the collective bargaining agreement and that the analysis of *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 112 (1988) applies equally to the RLA as to the LMRA.

Conrail has no bearing on this case. Using the "major/minor dispute" method of analysis, the Court in *Conrail* merely decided that a unilateral rule change affecting drug and alcohol matters constituted a minor dispute under the RLA based on the record in that case. There were no claims in *Conrail* to an independent right of action arising under any other statute and, accordingly, the decision does not address *Norris* or *Lingle* issues.

Even CNW knew that the RLA did not preempt the state law otherwise it would not have recognized the applicability of the Iowa or Minnesota law to BMWE employees when the act was passed. App. at 45-48.

None of the cases cited by the CNW in support of its RLA preemption claim are applicable. All but one are pre-*Lingle* and each involves a state common law, not statutory, claim. See, *Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc.*, 372 U.S. 714, 719 (1963); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1052 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972), it was *conceded* that the only right not to be discharged arose solely from the collective bargaining agreement. All these cases were pre-*Norris*.

The FRA agency opinion clearly demonstrates that no federal preemption arises from the FRSA and the regulations flowing from that statutory authority. App. at 42-44. Ignoring that agency opinion, as the CNW did in its Brief, does not rebut its strength.

There is no conflict between federal and Iowa law. The CNW confuses the concept of a lack of uniformity with conflicts between federal and state law. These concepts are very different but, in any event, the "requirement for uniformity is not absolute" and it is a "limitation [which] still leaves the States a wide scope." *American Dredging Co. v. Miller*, ___ U.S. ___, 114 S.Ct. 981, 987 (1994).

The only "conflict" identified by the CNW is that permitted drug testing under the Iowa Code is less stringent than those of the CNW. This statement is only true to the extent that it removes from the CNW the discretion concerning rehires upon a final finding of a violation.

The carrier claims that because the Iowa statute is a general labor statute and not a safety statute, it cannot

come within the savings clause of the FRSA. However, the federal government classifies all laws relating to drug and alcohol matters on the railroads industry as "safety" laws. Consider that the CNW **itself** refers to its own drug and alcohol rules as totally or partially based on safety concerns. See, CNW Brief at pp. 7, 11, 13, 24, 26, 28. Is this a state law relating to safety? CNW certainly considered it to be so from 1987 to 1991 since the CNW specifically conformed to it.

Using CNW's own terminology, drug and alcohol issues relate to safety and, therefore, the Iowa statute certainly relates to safety including rail safety. The savings clause of 45 U.S.C. § 434 which provides power to the States to continue in force law relating to railroad safety until the Secretary adopts a regulation covering the subject matter of state requirement does not allow preemption in this case.

Obviously, in the event of ambiguity, the test requires "any indulgence in favor of the States". *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. 2608, 2625-26 (1992).

3. There is no valid alternate ground of decision based on a claim to a right of summary judgment due to res judicata.

Res judicata arguments were raised by *both* sides in the Iowa District Court (arising out of an RLA case in Minnesota and a Chapter 730, Iowa Code case arising in Polk County, Iowa state district court). Neither was decided as part of the summary judgment ruling.

CNW's res judicata claim in its Brief in Opposition overstates both the law and the facts. Iowa law does not apply res judicata where the parties in the subsequent litigation did not have control over the parties to the Minnesota settlement agreement, did not have opportunity to bargain over the terms of the settlement and did not choose counsel for the settlement. *Harris v. Jones*, 471 N.W.2d 818, 820 (Iowa 1991); *In re Richardson's Estate*, 93 N.W.2d 777, 781 (Iowa 1958).

The issues in the settlement agreement were very different from the issues raised in these cases. It represents an amicable settlement in which the parties agreed to submit to the RLA arbitration mechanism all cases in which it was claimed that the CNW unilaterally changed working conditions related to Rule G. The settlement apparently anticipated the decision in *Conrail*. In contrast, this case addresses rights created by state law independent of the RLA.

The BMWE did not have authority to bargain away plaintiffs personal statutory right. These statutory rights were not waivable by the BMWE since its authority is restricted, in relevant part, to negotiation and resolution of mandatory and permissive topics of bargaining as defined by the RLA. The CNW has stated in an answer to an interrogatory that it has no bargaining duties under the RLA with regard to this topic. An affidavit was submitted in resistance to summary judgment by a respected member of the bar of this court, Larry Mann, and it disputed the factual and legal basis for the res judicata argument. It serves as sufficient basis of dispute as to deny summary judgment on this issue.

CONCLUSION

This case is worthy of a grant of certiorari for several substantial reasons:

The CNW did not seek state or federal agency opinions or declaratory judgment in state or federal court when it unilaterally decided to stop obeying Iowa and Minnesota law in 1991. Approximately 2,500 railway employees, are potentially affected by a carrier which is unwilling to respect the law. At least two states, Iowa and Minnesota, and their citizens are affected by the CNW's decision not to obey state law and the adverse social and economic consequences sought to be avoided by their legislatures when passing this legislation.

The effects of the CNW's position is, inter alia, to refuse to do that which Congress mandated, rehabilitation before discharge, using the hypocritical position that federal law mandates this result. While the CNW refers to the effect of Iowa's statute as one which would "water-down" the effectiveness of anti-drug and alcohol deterrents, there is no fact or opinion in the record of this case to support that claim. In making this claim, the CNW, finally reveals its real intent. Since such a belief is totally at odds with the core finding of Congress and the various states as to the urgent desirability of effective drug and alcohol rehabilitation, it is obvious CNW will use any argument to avoid compliance with this important goal.

Furthermore, the total disregard for well-established federal preemption principles in a published opinion of the Iowa Supreme Court may lead other courts to disregard the important precedents violated in this case.

The Petitioners request that the Court grant the Petition for the Writ of Certiorari and, following briefing and argument, that the decision of the Iowa Supreme Court be reversed and remanded for further proceedings.

Respectfully submitted,

HARRY W. ZANVILLE
ZANVILLE AND ZIMMERMANN
3116 Brockway Road
P.O. Box 426
Waterloo, IA 50704
(319) 232-1404

AFFIDAVIT OF LARRY MANN

~~STATE OF~~ District of Columbia)
) ss
_____ ~~COUNTY~~)

I, Lawrence M. Mann, being duly sworn on oath, hereby depose and state:

1. That I am a practicing attorney in Washington, DC and that I regularly represent the Railway Labor Executives Association and the various labor union brotherhoods throughout the United States.

2. That I was chief counsel for the Railway Labor Executives Association, et. al. in U.S. District Court, District of Minnesota, Third Division, Case No. 3-88-409, the subject of claimed res judicata in various Iowa litigation between the Chicago and Northwestern Transportation Company and rail laborers/union brotherhoods. I directed the Plaintiff's case in the U.S. District Court for the District of Minnesota, Fourth Division, Case No. 4-86-575

3. That I have personal knowledge and was directly involved in the drafting of the settlement agreement in the above-mentioned federal case in Minnesota.

4. That the federal case in Minnesota exclusively dealt with the questions of whether the Railway Labor Act prohibited the Chicago and Northwestern Transportation Company from making unilateral changes in its Rule G or ADU policy.

5. The settlement agreement in the federal case in Minnesota specifically agreed that the RLEA and the

named union brotherhoods would recognize that the Railway Labor Act provisions of Section 153 would exclusively govern the question of whether the Chicago and Northwestern Transportation Company had made unilateral changes or was prohibited by its collective bargaining agreement from taking action against its employees for claimed violations under ADU policy or Rule G.

6. The RLEA and the various union brotherhoods did not waive any state law rights, did not intent [sic] to waive any state law rights, and as a matter of law, were incapable of waiving any state law rights through the settlement agreement and disposition of the federal case in Minnesota.

7. The claim by the Chicago and Northwestern Transportation Company that the settlement agreement in the federal case in Minnesota was intended to or did waive any state rights that union brotherhoods or members of the union brotherhoods possess is without basis in fact or law.

8. The settlement and disposition in the Fourth Division federal case in Minnesota similarly disposed of the unilateral change questions related to Rule G. Like the other case, the Fourth Division case was not intended to and did not waive any state law rights which are at issue in the current litigation in Iowa.

9. The affidavit was transmitted by facsimile with my express consent and will be replaced later with a written original.

Further, I state not.

/s/ Lawrence M. Mann
LAWRENCE M. MANN

Subscribed and sworn to before me this 20th day of August, 1992.

/s/ Audrey A. Lucas
Notary Public, District of Columbia

AUDREY A. LUCAS
Notary Public, District of Columbia
My Commission Expires June 15, 1995.